(23,295)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1912.**

## No. 720.

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MATTIE W. JACKSON, WIDOW; WILLIAM GRAHAM JACKSON AND GLADYS L. JACKSON, INFANTS, BY MATTIE W. JACKSON, THEIR NEXT FRIEND, AND ERNEST H. JACKSON, APPELLANTS,

*vs.*

THE UNITED STATES.

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APPEAL FROM THE COURT OF CLAIMS.

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INDEX.

1 *I. Original Petition. Filed February* 21, 1894.

In the United States Court of Claims.

WILLIAM L. JACKSON, Executor of the Estate of Mary E. Jackson, et al.,
vs.
THE UNITED STATES.

*Petition.*

To the Honorable the Chief Justice and the Associate Justices of the United States Court of Claims:

William L. Jackson, Executor of the estate of Mary E. Jackson, deceased, and William L. Jackson, individually, and Ernest H. Jackson, sole devisees and heirs at law of the deceased, all residents of Adams county, Mississippi, and citizens of said State, bring this their petition against the United States, and show to the Court:

1. That said William L. Jackson, individually, and said Ernest H. Jackson, as sole devisees and heirs at law aforesaid, own as tenants in common, and said William L. Jackson, as executor aforesaid, possesses, that certain tract of land and cotton plantation, situated in Adams county, Mississippi, on the East bank of the Mississippi river, at Jackson's Point, about forty miles below the City of Natchez, and twenty-five miles above the mouth of the Red river, known as Jackson's Point, Alloway, Cerro Gordo and Black Hills plantations, containing 1325 acres of cultivated land and 1095 acres of wild land, more or less, and bounded, North by the Mississippi river; West by the Mississippi river; South by Wakefield plantation, belonging to Brown & Larned and Mrs. M. C. Dunbar, and East by lands of Mrs. Lucy Gastrell and H. C. Cameron.

2. That before and prior to the year 1890 said plantation from its natural situation, was comparatively high and exempt from overflow from the waters of the Mississippi river, except at long intervals, and the occurrence of such overflows did not materially affect its productive capacity, or its value.

That said plantation was highly improved, well stocked with laborers and tenants, yielded yearly large crops of cotton, corn and other products, and was worth the sum of fifty thousand dollars.

3. That about the year 1883 the officers and agents of the United States, in pursuance of the act of Congress creating the Mississippi River Commission, and of the subsequent acts for the improvement of the navigation of the Mississippi River, adopting the so-called Eads' plan, projected, and have constructed, and are constructing, a system of public works for the purpose of so confining the waters of the river between lines of embankment, or levees, as to give increased elevation and velocity and force to the current in order to

scour and deepen the channel, and have thus caused an increased and abnormal elevation of at least four feet to the waters of the river at the high water or flood stage; and for said purposes have adopted and made use of systems of public and private levees, originally constructed for the reclamation of overflowed lands, on the west bank from the highlands of Arkansas to the mouth of the Red river, and from the mouth of the Red river to the Passes, and on the east bank from the highlands of Tennessee to the mouth of the Yazoo river, and from Baton Rouge to the Passes; but from the mouth of the Yazoo river to Baton Rouge, instead of adopting and constructing levees, have made use of the highlands skirting the river for said purpose, and have thus placed the plantations of petitioners, and others similarly situated between the lines of embankment, and exposed to the full force of the currents of the river, with such increased and abnormal flood level.

And are so raising, enlarging, strengthening, adding to and constructing such levees, as to cause the plantations of petitioners, and others so situated to be flooded annually by the waters of the river, and to destroy the crops, growing and grown thereon, and to drown the live stock, and to undermine and wash away the buildings, fences and other improvements, and to fill up the drains and ditches, and to wash off the soil, and to cover the lands with sand and gravel, and to render them unfit for cultivation, and to entirely destroy their value.

2 4. That in pursuance of the said plan for the improvement of the navigation of the river, the said officers and agents of the United States have undertaken to close the Atchafalaya river, a natural outlet carrying off near one-third of the surplus waters of the Mississippi, and to force the waters of the Red river and its tributaries, from their natural course through the Atchafalaya river to the Gulf of Mexico, into the channel of the Mississippi river, and have so obstructed, and are so obstructing, the passage of the surplus waters through the Atchafalaya as to cause the waters of the rivers at the flood stage to annually back up and overflow the lands of petitioners, and to destroy the crops, growing and grown thereon, and to deposit thereon superinduced additions of water, earth, sand and gravel, so as to render them unfit for cultivation, and to entirely destroy their value.

5. That by reason of the premises aforesaid the lands of petitioners, which before, from their natural situation, were comparatively high and secure from overflow, have been flooded annually by the waters of the rivers thus confined, in the years 1890, 1891, 1892 and1893, and the crops growing and grown thereon, have been each year destroyed by said overflows, so caused, and the live stock drowned, and the buildings and fences and other improvements undermined and washed away, and the ditches and drains filled up and the soil washed off, and covered with sand, and earth and gravel, so as to render them unfit for cultivation, and to entirely destroy their value, to the injury and damage of petitioners, as follows, to-wit:

| | |
|---|---|
| 1890— | |
| To 197 bales of cotton at $40 per bale | $7,880 00 |
| To houses and fences injured and lost | 500 00 |
| To 4 mules lost, at $125 each | 500 00 |
| To 3000 bushels of corn destroyed | 1,500 00 |
| To 25 head of cattle lost | 250 00 |
| To 15 head of sheep lost | 22 50 |
| 1891— | |
| To 100 bales of cotton at $40 per bale | 4,000 00 |
| To houses and fences injured and lost | 250 00 |
| To 3 mules lost at $100 each | 300 00 |
| To 10 head of sheep lost | 15 00 |
| 1892— | |
| To 531 bales of cotton destroyed, at $50 per bale | 25,550 00 |
| To 3000 bushels of corn destroyed | 1,500 00 |
| To houses and fences injured and lost | 50 00 |
| To 6 mules lost, at $100 each | 600 00 |
| To 60 head of sheep lost | 90 00 |
| 1893— | |
| To 415 bales of cotton destroyed, at $30 per bale | 12,450 00 |
| To 1,500 bushels of corn destroyed | 750 00 |
| To houses and fences injured and lost | 50 00 |
| To value of lands and improvements destroyed | 50,000 00 |
| Total | $107,257 50 |

And your petitioners say that this precipitation, and this backing, of the waters of the river, by the works of the United States for the improvement of the navigation of the river, so as to overflow the lands of petitioners annually, and to destroy the crops, growing and grown thereon, and to drown the live stock, and wash away the buildings, fences and other improvements, and to fill up the drains and ditches, and to wash off the soil, and to cover the lands with sand, earth and gravel, and to render them unfit for cultivation, and to entirely destroy their value, is such a serious interruption to the common and necessary use of the property as to be equivalent to a taking within the meaning of the Constitutional provisions, and being done in pursuance of the acts of Congress authorizing it for the public benefit, and under the direction of the Mississippi River Commission and the Secretary of War, and the United States Engineers, imposes on the United States an implied obligation to make compensation for the property so taken and destroyed. Wherefore they bring this suit, and pray that it be adjudged and decreed that the United States pay to petitioners the value of their property so taken for public use, to the amount of $107,257.50; and for such other relief in the premises as the nature of the case may require.

WM. L. JACKSON, *Executor.*
WM. L. JACKSON.
E. H. JACKSON.

3 Before me personally came and appeared William L. Jackson, individually and as Executor of Mary E. Jackson, and Ernest H. Jackson, who being by me duly sworn, depose and say that they believe the facts as stated in their said petition to be true, that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, that said claimants are justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that the claimants have at all times borne true allegiance to the Government of the United States.

WM. L. JACKSON, *Executor.*
WM. L. JACKSON.
E. H. JACKSON.

Subscribed and sworn to before me, January 1, 1894.
VOLNEY M. LIDDELL, *J. P.*

*II. Demurrer. Filed May 31, 1894.*

Comes the Attorney-General and demurs to the petition heretofore filed in this cause upon the following grounds:

1. Because the petition does not show that the defendant has done any act within six years next before the filing thereof by which claimants have been injured.
2. Because the petition shows that the injury complained of did not grow out of any contract express or implied between claimants and defendant, but was a tort of which this court has no jurisdiction.
3. Because the petition does not state a case of which this court has jurisdiction.

J. E. DODGE,
*Assistant Attorney-General.*

*III. Argument and Submission of Demurrer.*

On the 23rd day of April 1896, the demurrer came on to be heard. Mr. Samuel A. Putman was heard in support of the demurrer, no attorney being present for the claimants, and the demurrer was submitted.

4 *IV. Opinion of the Court Overruling Demurrer. Filed June 1, 1896.*

WILLIAM L. JACKSON et al.
v.
THE UNITED STATES.

NOTT, J., delivered the opinion of the court:

The question in this case is whether it comes within the decision in Hayward (30 C. Cls. R., 219) or within the decision in Pumpelly v. Green Bay Company (13 Wall. R., 166).

In the former case the act assigned as the taking of the claimant's land was not so much what the Government did as what it neglected to do. The land was overflowed, washed away, and for practical purposes destroyed. The cause alleged was the faulty construction of a dam. The effect of this faulty construction was a catastrophe—the breaking of the dam during a freshet. The washing away of all that made the land valuable in a single hour caused the destruction; and there was no actual or constructive user of the claimant's property by the Government for any purpose whatever.

In the case of Pumpelly v. Green Bay Company, a permanent dam had been erected. The report of the case does not set forth the declaration by which the facts were presented to the Supreme Court; and it is not altogether clear what those facts were. This much, however, is stated by the reporter, "The declaration averred the waters of the lake were raised so high as to forcibly and with violence overflow all his said land, from the time of the completion of the dam, in 1861, to the commencement of this suit; the water coming with such a violence as to tear up his trees and grass by the roots and wash them, with his hay by tons, away, to choke up his drains and fill up his ditches, to saturate some of his lands with water, and to dirty and injure other parts by bringing and leaving on them deposits of sand, and otherwise greatly injuring him." It also appears, in the opinion of the court, that "the declaration states that by reason of the dam the water of the lake was so raised as to cause it to overflow all his land, and that the overflow remained continuously from the completion of the dam in the year 1861 to the commencement of the suit in the year 1867." The court adds that "the nature of the injuries set out in the declaration are such as to show that it worked an almost complete destruction of the value of the land."

A continuous overflow of the land and "an almost complete destruction of the value of the land" seem to be the two important facts upon which the Supreme Court rested its decision that there had been a taking of private property for public purposes within the intent and meaning of the Constitution.

In the present case the facts are also presented by the pleadings. The petition, which is confessed by demurrer, alleges that in the year 1883 the officers of the United States in pursuance of the act of Congress creating the Mississippi River Commission projected a system of public works for the purpose of so confining the waters of the river between lines of embankments or levees as to give increased elevation and velocity and force to the current, and have thus caused an increased and abnormal elevation in the waters of the river at high water or flood stage. The petition also alleges that the effect of these public works is to "cause the plantations of petitioners, and others so situated, to be flooded annually by the waters of the river, and to destroy the crops growing and grown thereon, and to drown the live stock, and to undermine and wash away the buildings, fences, and other improvements, and to fill up the drains and ditches, and to wash off the soil, and to cover the lands with sand and gravel, and to render them unfit for cultivation, and to entirely destroy their value.

"That in pursuance of the said plan for the improvement of the navigation of the river the said officers and agents of the United States have undertaken to close the Atchafalaya River, a natural outlet carrying off near one-third of the surplus waters of the Mississippi, and to force the waters of the Red River and its tributaries from their natural course, through the Atchafalaya River to the Gulf of Mexico, into the channel of the Mississippi River, and have so obstructed and are so obstructing the passage of the surplus waters through the Atchafalaya as to cause the waters of the rivers at the flood stage to anually back up and overflow the lands of petitioners, and to destroy the crops growing and grown thereon, and to deposit thereon superinduced additions of water, earth, sand, and gravel, so far as to render them unfit for cultivation and to entirely destroy their value."

5 The material difference between this case and that of Pompelly v. Green Bay Company is that here the overflow of the water was not continuous. But the essential fact is averred that the annual overflow of the claimants' land in consequence of the Government's works is such as "to render them unfit for cultivation and to entirely destroy their value." In that essential this case is stronger than the other, for Mr. Justice Miller says that the facts averred are such as to show that the dam and consequent overflow "worked an almost complete destruction of the value of the land."

It is true that here the claimant is free to go upon his land during the non-agricultural portions of the year; that is to say, after the spring and summer floods have passed away. But so was the plaintiff, in the other case, free to go upon his land while it was overflowed and do what he could with it. It is not an absolute taking of land which constitutes a taking of private property for public use. Mr. Justice Miller, quoting Angel on Water Courses and stating apparently the conclusion of the court, says that "there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be equivalent to the taking of it, and that under the constitutional provision it is not necessary that the land should be absolutely taken."

The petition undoubtedly sets up losses which are in the nature of consequential damages, of which the court has not jurisdiction. The Government may have increased the effect of the flood wrongfully or rightfully by the erection of its levees; but it did not in the constitutional sense of the term take the claimants' cotton, mules, corn, cattle, and sheep for public use. Such a claim is not founded on an implied contract, and of it the court has not jurisdiction. But the petition does allege that "the value of the land and the improvements destroyed was $50,000;" and that taking is presented by allegations so closely resembling those in the Pumpelly v. Green Bay Company Case that this court does not feel at liberty to say that they present no valid cause of action.

The judgment of the court is that the defendants' demurrer to the petition be overruled, with leave to the defendants to answer within thirty days.

6 *V. History of Proceedings.*

On May 4, 1908 the claimant filed a supplemental petition.

On August 14, 1908 the claimant filed a second supplemental petition.

On August 25, 1908 the defendant demurred to the claimants' original petition, the supplemental petition filed May 4, 1908, and the second supplemental petition filed August 14, 1908.

On October 13, 1908 the claimants filed a third supplemental petition.

On February 17, 1909 the defendant demurred to the original and three supplemental petitions.

On April 5, 1909 the demurrer came on to be heard. Mr. William W. Scott was heard in support of the demurrer. Mr. Wade R. Young was heard in opposition, and the demurrer was submitted.

On April 7, 1910 the Court filed the following order on said demurrer:

Within the former ruling in this case (31 C. Cls., 318), the demurrer to the original and supplemental petitions, in so far as they or either of them aver a taking of real estate—within six years from the date of filing of said petitions—by overflow proximately caused by the construction of levees or other public works in the improvement of the navigation of the Mississippi River pursuant to acts of Congress and within the ruling of the cases of Pumpelly v. Green Bay Company (13 Wall., 166) and United States *v.* Lynah (188 U. S., 445), is overruled.

But as to the alleged annual destruction of crops and personal property on said land so taken by overflow the demurrer is sustained.

By THE COURT.

On March 17, 1911, a motion was filed suggesting the death of William L. Jackson, and to revive suit in the name of Mattie W. Jackson, widow, William Graham Jackson and Gladys L. Jackson, infants, and Ernest H. Jackson, which motion was allowed by the Court March 31, 1911.

On March 21, 1911 the defendants filed a general traverse.

7 On April 4, 5, and 6, 1911 the case came on to be heard. Mr. Wade R. Young was heard for the claimants; Mr. William W. Scott was heard in opposition; Mr. Waitman H. Conaway replied and the case was submitted.

On December 4, 1911, the Court filed findings of fact and conclusion of law, dismissing petition; opinion by Booth, J.

On December 13, 1911 the claimants filed a motion to amend the findings of fact.

On January 15, 23, and 24, 1912 this motion came on to be heard. Mr. Waitman H. Conaway was heard in support of the motion, Mr. William W. Scott was heard in opposition thereto; Mr. Conaway replied and the motion was submitted.

*VI. On January 25, 1912, the Claimants Filed their Fourth Supplemental and Amended Petition, which is as Follows:*

MATTIE W. JACKSON, Widow; WILLIAM GRAHAM JACKSON and GLADYS L. JACKSON, Infants; and ERNEST H. JACKSON,

v.

THE UNITED STATES.

To the Honorable the Court of Claims:

The petition of Mattie W. Jackson, widow, William Graham Jackson and Gladys L. Jackson, infants, who sue by Mattie W. Jackson, their next friend, and Ernest H. Jackson, respectfully show unto the court that there has already been filed in the above styled case the following petitions, viz:

The original petition on February 24, 1894; first supplemental petition filed on May 4, 1908; second supplemental petition filed on August 14, 1908; and their supplemental petition filed on October 13, 1908, which petitions, as petitioners are advised and be-
8 lieve, do not fully state their cause of action against the United States, as shown by the proof in the record, and they desire to supplement the same in the following particulars:

(1) Mary E. Jackson owned and possessed during her lifetime and at the time of her death the plantations described as Jackson Point, Alloway, Cerro Gordo and Black Hills.

(2) By the last will and testament of Mary E. Jackson, bearing date of September 25, 1887, she devised said lands to her son, E. H. Jackson, and appointed her husband, William L. Jackson, testamentary executor, but her husband, as provided by the statutes of Mississippi, renounced the will and took a child's portion, and he and his son, E. H. Jackson, acquired the lands as tenants in common.

(3) Said William L. Jackson died in 1895, testate, and by his last will and testament, bearing date January 19, 1896, devised one-fourth of his interest in said land to said E. H. Jackson and the other three-fourths interest in said land to his widow (he having married a second time) Mattie W. Jackson, for life, with remainder in fee to William Graham Jackson and Gladys L. Jackson, the two children of the marriage, the widow administering on his estate.

(4) Said land was partitioned among the owners thereof by judicial decree of the chancery court of Adams County, Miss., on December 15, 1896, each of the tenants taking his and her shares in severalty, said E. H. Jackson taking five-eighths and said Mattie W. Jackson taking three-eighths, and since that time said lands have been cultivated in severalty.

The decree of the chancery court of Adams County, Miss.,
9 entered December 15, 1896, confirming the commissioners' report partitioning said lands, describes the same as follows, to wit:

To Mattie W. Jackson as follows:

"1st. That certain plantation of land commonly known as 'Cerro Gordo' situate in said county of Adams and State of Mississippi, in

'Dead Man's Bend' on the Mississippi River, said plantation being bounded on the north by lands of the estate of Wm. McElroy, on the east by lands (formerly) of Holliday & Graham, on the south by lands (formerly) of W. H. Dunbar, and on the west by the Mississippi River, containing 200 acres, more or less.

"2d. That certain tract of land situate in said State of Mississippi, County of Adams, on the Mississippi River, known as the 'Black Hills' plantation; bounded on the north by said Mississippi River; east and south by lands formerly of Mary E. Jackson deceased, and Annie M. Helvey, and west by lands of Jacob Miller, containing 57.25 acres, more or less, and with courses and distances as shown by a certain map of record in Book 3-E, page 609, of the records of deeds of said County of Adams, made by C. W. Babbit, C. E., being the same tract of land sold and conveyed to Ernest H. Jackson and William L. Jackson, deceased, by Henry Frank, trustee, by deed dated the 5th of December, 1892, and recorded in Book 3-E, page 733, of said records of deeds.

"3rd. All that certain plantation of land lying, being and situate in the County of Adams, State of Mississippi, on the Mississippi River, in that portion of said county known as Dead Man's Bend,' said plantation being called and known as 'Alloway,' and containing, with the exceptions hereinafter mentioned, the following tracts, to wit:

10 The south half, the northwest quarter, and the west half of the northeast quarter of section six (6), township three (3), range four (4) west, containing 568.27 acres entered by Thos. Lewis, Polly Williams, W. H. Edwards, and Leo. Tarleton. Also lots one (1), two (2), three (3), and four (4), fractional section eighteen (18), township four (4), range four (4) west, containing 314.41 acres, entered by Samuel Martin and Lewis & Barnard. Also lot six (6) of fractional section one (1), township four (4), range five (5) west, containing 80 acres, entered by James Swing. Also the north half of section one (1), township three (3), range five (5) west, containing 322.50 acres. Also lots three (3), four (4), and five (5), township three (3), range five (5) west, containing 240 acres, in all about 1,524 acres (originally). Excepting, however, that certain piece or parcel of land containing 270 acres, set off to Ernest H. Jackson and more particularly described as follows, to wit:

"Beginning for northeast at a point on the Mississippi River at the north end of a ditch at a point designated A on said map; thence south 3 degrees east along the center of said ditch about 28 chains to its southern end, where is planted an iron post on the bank, and on the same course about 49 chains in all to an iron post planted on the south boundary of 'Alloway' at point marked B on said map; thence west through the middle of section 1, T. 4, R. 5, 48.20 chains to a large gum tree, at the point C on said map, on the west bank of a canal and marked x x, and old-established corner; thence north between sections 1 and 2, T. 3, R. 5, W., 40 chains to an iron post and on 25 chains more, between sections 1 and 2 of T. 4, R. 5

11 W., to the bank of the Mississippi River at the point D on said map; thence southeasterly along the river to the place

of beginning; being the tract shaded yellow on said map; and designated thereon by the words and figures '270 acres of Alloway set off to E. H. Jackson.'

To Ernest H. Jackson as follows:

"1. That certain plantation of land, lying, being and situated in said County of Adams, State of Mississippi, in that part of said county known as 'Dead Man's Bend' on the Mississippi River, called and known as 'Jackson's Point,' containing the following tracts, to wit:

"Lots one (1), two (2), three (3), four (4), five (5), and six (6) of fractional section two (2), township four (4), range five (5) west, containing 548 acres. Also the northwest quarter of fractional section two (2), township three (3), range five (5) west, containing 158.62 acres. Also fractional section three (3), township four (4), range five (5) west, containing 126 acres; in all, 832.62 acres; also the batture in front of said section 3, T. 4, R. 5 west, as shown on said map.

"2. All that certain piece or parcel of land containing 270 acres, heretofore a part of the 'Alloway' plantation, and more particularly described as follows, to wit:

"Beginning for northwest corner at a point on the Mississippi River at the north end of a ditch at the point designated A on said map; thence south 3 degrees east along the center of said ditch about 28 chains to its southern end, where is planted an iron post on the bank, and on same course about 49 chains in all to an iron post planted on the south boundary of 'Alloway' at a point marked
12 B on said map; thence west through the middle section 1, T. 4, R. 5, 48.20 chains to a large gum tree at the point C on said map, on the west bank of a canal marked XX, an old-established corner; thence north between sections 1 and 2 of T. 3, R., 5 W., 40 chains to an iron post, and on 25 chains more between sections 1 and 2 of T. 4, R. 5, W., to the bank of the Mississippi River at the point D on said map; thence southeasterly along the river to the place of beginning; being the tract shaded yellow on said map and designated thereon by the words and figures '270 acres of Alloway set off to E. H. Jackson.'

On the 30th day of December, 1899, Ernest H. Jackson purchased from George M. Brown and Rufus F. Learned, for the sum of $13,000, the Wakefield plantation, described in said deed of conveyance as follows:

"All that certain tract of land situated, lying and being in the County of Adams, State of Mississippi, and now known as Wakefield plantation, being lot No. 3 of the original Wakefield plantation, which was allotted and set apart to Brown & Learned of the first part by the final decree of the chancery court of Adams County, rendered October 24, 1891, in that certain partition suit styled Mary C. Dunbar, et al., v. Ida Dunbar, et al., numbered 1004 on the general docket of said court, said final decree being of record on pages 768-770 of Book 3-H of the records of deeds of said Adams County. Said lot No. 3 at time of rendition of said decree contained 240 acres of open land and 1,170 acres of batture, in all 1,460, as will appear from the map of Wakefield plantation filed in said cause

and of record on page 451 of Book M of final records of chancery court, and it is described in said final — as follows, to wit:

13 "Lot No. 3, beginning at S.E. corner at corner of sections 4 and 5 post, where a china tree bears N. 7 degree- E. 50 feet; thence with line of the Baker tract N. 1 degree 25 minutes W., 82 chains to S.W. corner of lot No. 2 of Wakefield, and on same course with lots No. 2 about 30 chains to Canal Bayou; thence along Canal Bayou, and the middle of the slough previously mentioned, with lot No. 1 to N.W. corner of lot No. 1; thence west with W. L. Jackson 7.00 chains to an iron post to mark the 1¼ section corner of sections 2 and 3; thence N. 1 degree 25 minutes W., still with W. L. Jackson, 40 chains to iron pin on township line to mark corner of 2 and 3; thence west on township line at 13.70 chains is stake in road, where a china tree bears N. 64 degrees E. 48 links at 43.70, across a wire fence 80.00 is on bank of Mississippi River, where cottonwood XS. 25 degrees E. 18.00 north 23.00 N. 38½ E. 35; thence down the river to south boundary of section 4 and with it east to the beginning; also all the batture and alluvial deposits lands now connected to or belonging to said lot No. 3 of original Wakefield plantation."

(5) That said Jackson lands are situated at Jackson Point, in the Alluvial Valley of the Mississippi, on the left bank of the river, 40 miles below Natchez and 25 miles above the mouth of Red River.

(6) That the basin in which the Jackson lands are situated commences at Ellis Cliff, about 20 miles below Natchez, and extends to Fort Adams, about 50 miles below, with an average width of 2 miles and a maximum width of 6 miles, and is one of six (6) small basins of the Homochitto Basin.

(7) That before and prior to the year 1890 said plantations, from their natural situation, were comparatively high and exempt from overflow by the flood waters of the Mississippi River,

14 except at long intervals, and the occurrence of such overflows did not materially affect their productive capacity or their value.

(8) That said plantations were highly improved, well stocked with tenants and laborers, yielded yearly large crops of cotton, cotton seed, corn, hay and other products, and were well worth the sum of $300,000.00, and except for the injuries complained of would be now worth said sum of $300,000.00.

(9) That for time beyond the memory of man the flood waters of the Mississippi River, passing Helena, Ark., where the highlands abut on the river, had escaped into the White River and Upper Tensas Basins, and passed in part through the Boeuf Cut-off into the Ouachita Basin, and in part down the Bayous Macon and Tensas, and on by the Atchafalaya River to the Gulf of Mexico, and if they ever reached the lands of claimants in sufficient volume to flow them were speedily reduced by crevasses on the west bank, which allowed them to escape into the Atchafalaya Basin, and thus relieved the lands of claimants.

(10) That about the year 1883 the officers and agents of the United States, in pursuance of the Act of Congress creating the

Mississippi River Commission, and of the subsequent acts for the improvement of the navigation of the Mississippi River, adopted the so-called Eads plan, by Act of Congress approved March 3, 1881, in consequence whereof have projected, and have constructed, and are constructing, a continuous system of public works, for the purpose of so confining the flood waters of the river between lines of embankment, or levees, as to give increased elevation and velocity and force, to the currents, in order to scour and deepen
15 the channel, and have thus caused an increased and abnormal elevation of at least nine feet to the waters of the river at the high water or flood stage; and for said purpose have adopted and made use of systems of public and private levees, originally constructed for the reclamation of overflowed lands, on the west bank from the highlands of Arkansas to the mouth of the Red River, and from the mouth of the Red River to the Passes, except the Bougere, Morganza and other crevasses furnishing natural outlets for the flood waters, but from the mouth of the Yazoo River at Vicksburg, Mississippi, to Baton Rouge, instead of adopting and constructing levees, have made use of and adopted the highlands skirting the river for said purpose, and have thus placed the lands of the claimants and others similarly situated, between the lines of embankment with an increased grade of 23.4 feet, in the adopted high water bed of the river, and exposed to the full force of the currents of the river, with such increased elevation and velocity and force, on the ground that it is better to destroy and pay for the lands than to protect them, and have frequently acknowledged their responsibility and recommended that Congress make some provision for the adjustment of the equitable claims of the land owners in such cases, but that Congress has neglected to make such provision.

(11) That in pursuance of their said plan the officers and agents of the United States have constructed, and maintain, a system of levees from Helena to the mouth of the White River, and from the highlands of Arkansas to the Louisiana line, and have thus prevented the flood waters of the Mississippi River from
16 passing into the Bayous Macon and Tensas and Boeuf, Ouachita and Atchafalaya Rivers, where they were wont to flow in times of high water, and have confined all the flood waters within the main channel, made much narrower, and have brought them down on the lands of the claimants, between the levees on the west bank and the highlands on the east bank, and have thus caused a much greater volume to pass over the lands of the claimants than ever before, and to raise the river at that point much higher.

(12) That in pursuance of their said plan the officers and agents of the United States proceeded to close the outlets, by which in times of high water the flood waters escaped into the basins, and constructed and maintain levees at the most important stations on the river, and have thus prevented the flood waters from passing into the Tensas and Atchafalaya Basins, where they were wont to flow in times of high water, and have confined all the flood waters within the main channel, made much narrower, and have so obstructed, and are so obstructing, the passage of the flood waters

below, as to cause the waters of the river at the flood stage to back up and overflow the lands of the claimants.

(13) And are so raising, enlarging and strengthening, adding to and constructing such levees, as to cause the lands of claimants and others so situated, to be flowed annually by the waters of the river thus confined, and to destroy the crops growing and grown thereon, and to drown the live stock, and to undermine and wash away the buildings, fences and other improvements, and to fill up the drains and ditches and to wash off the soil, and to cover the lands with superinduced additions of water, earth, sand and
17 gravel, and to render them unfit for cultivation, and to entirely destroy their value.

(14) That the officers and agents of the United States, in pursuance of their said plan, have checked the enlargement and limited the outlet capacity of the Atchafalaya River, estimated to carry off one-fourth of the flood waters of the Mississippi River, and have closed the Bougere Crevasse, which was 29 miles in length and had been open since 1859, and extending the levee line on the west bank twenty-six miles down to the mouth of Red River, and have thus caused, and will continue to cause, an increased and increasing volume of flood waters to pass over the lands of the claimants, and after expending more than $25,000 in private levees in the effort to protect their property from the destructive effects of the works of the United States, they find it beyond their power and beyond the power of any private person, to construct and maintain levees sufficiently high and strong for that purpose.

(15) That the plantations of petitioners are located within the limits of a narrow strip of land lying between the low water bank of the Mississippi River and the highlands east of it between Vicksburg and Baton Rouge, where the highlands skirt very closely to the river bank and are not protected by levee construction other than that built by the claimants, which has been destroyed and washed away by the recent flood waters of said river after the levee system had practically reached a state of completion and the United States had closed the Bougere Crevasse, as hereinafter alleged.

(16) That the United States has not attempted to connect the levee line on the east side of said river by the construction
18 of levees on said irregular and narrow strip of land lying between Vicksburg and Baton Rouge for the reason that the cost of said levee construction, as shown by the Mississippi River Commission's Report for 1896, and the report and survey of the small basins in the Homochitto levee district between Ellis Cliff and Fort Adams, made in 1895 by Col. Geo. B. McC. Derby, the engineer officer in charge of said district, would exceed the value of the land lying between the river and the foot-hills, (of which petitioners' lands are a part), to the amount of $206,500.00, it being more economical to use the foothills as levees, as now being done, and pay for the land destroyed, than to build levees on the east bank of said river between said city of Vicksburg and the city of Baton Rouge. That the Mississippi River Commission, in its report for the year 1910, in part says that the lands of petitioners are now subject to perpetual inundation.

That the extension of said levee system on both banks of said river by the United States from Cape Girardeau, Mo., to the Head of the Passes was authorized by Act of Congress in 1906 as shown in 34 Stat. L., p. 208.

(17) That the Bougere Crevasse was a break in the river bank located in the State of Louisiana on the opposite side of the river from the Jackson land, fu-nishing an outlet for flood waters in times of high water. This crevasse in said bank occurred during the flood of 1859 and remained entirely open until the year 1902, when efforts to close it were commenced by the United States, the closing of which was completed on June 28, 1910 by the United States, thus giving a continuous line of levees in the lower Tensas levee district as far down as Point Breeze, about 9 miles above Old River.

That the levee line connecting with the Bougere levee opposite petitioners' lands, many miles above said lands, and the levee line connecting with the Bougere levee, many miles below, were joined by the United States, thus making a continuous line of levees opposite the Jackson land of 23.4 feet in height or from 8 to 10 feet above the highest known water, which levee, when completed, obstructed the natural flow of the flood waters of said river into their natural outlets and basins and backed the same on to the lands of petitioners, producing an increased flood height of 9 feet or more on their lands.

(18) Before the joining of the levee lines by the United States in accordance with the Eads plan, thus making the same continuous, and before the Bougere Crevasse was closed by the United States, there were occasional overflows of petitioners' lands but they have been made deeper, more frequent and more forceful by the adoption and completion of said levee system, which overflows, before the adoption of said system and the closing of said Bougere Crevasse, did not materially damage said land and it still remained valuable for agricultural purposes.

From 1896 to 1907, while the levee line opposite petitioners' lands was down and the Bougere levee uncompleted, and before levee construction reached a state of completion, your petitioners, with the aid of private levees theretofore constructed on their lands and by replanting after overflows, were able to raise partial crops of cotton, corn and other products, but by offsetting losses against profits from the cultivation of said land during that period, shows that it was not profitable to cultivate the same, and that petitioners in their attempt to so cultivate said land lost many thousands of dollars.

In the year 1908 your petitioner, E. H. Jackson, put in cultivation 1,650 acres on Jackson Point, Alloway and Wakefield plantations, of which 1,150 acres were in cotton and 500 acres in corn, costing him $6,000 to prepare and plant said crops. These crops were destroyed by the flood waters of 1908.

That in the same year 1908 your petitioner, Mattie W. Jackson, put in cultivation on her lands at Jackson Point 600 acres, of which 500 acres were in cotton and 100 acres in corn, costing $2,500 to

prepare and plant said crops. These crops were destroyed by the flood waters of 1908.

That in the year 1909 your petitioner, E. H. Jackson, had in cultiva-ion only 500 acres of said land, of which 300 acres were in cotton and 200 acres in corn. That a flood came in April of that year and destroyed these crops. That petitioner replanted 300 acres of said land; that another flood came in June of that year and took a part of said crop, so that he was only able to raise and gather 10 tons of pea hay and about 1,500 bbls. of corn, the cotton crop being destroyed by the flood waters of that year. That it cost him $7,500 to make and gather the crops of 1909.

That in the same year 1909 your petitioner, Mattie W. Jackson, had in cultivation 300 acres of said land, of which 200 acres were in cotton and 100 acres in corn, costing her $2,000 to plant the same. That a flood came in April of that year and destroyed her crops, except about 40 acres of cotton. That another flood came in May of that year and continued too late to plant cotton. That another high water came in August of that year which had the effect of keeping the water on the land which was already there from previous overflows of April and May of that year. That for 1909 she was able to gather only 10 bales of cotton and 300 bbls. of corn.

That said lands were overflowed three times in 1907, four times continuously in 1908 for a period of 120 days, and three times successively in 1909. That said lands are practically of the same elevation as other lands adjacent thereto bordering on the said river on the same side thereof, for many miles above and below said land. That the levee system on the pposite side of the river, above and below said land, having now reached a state of completion, it is now no longer practicable for petitioners to protect said lands by private levees.

(19) That the effect of the frequent and successive overflows of said lands in the years 1907, 1908 and 1909 as aforesaid was to drive away the tenants, cover 1,700 acres thereof with sand deposits from 6 inches to 6 feet in depth; that said lands then grew up in weeds, young willows and cottonwood from 6 feet to 15 feet in height; that the buildings, houses and cabins on said lands were damaged to the extent of some of them being lifted from their foundations and washed into the fields, the floors torn up, the fences on the lands washed away and torn to pieces by the swift currents of the water running through and over said lands; and that said lands have been destroyed and now have no commercial value whatever.

That petitioner, E. H. Jackson, has lost at least the sum of $50,000 in his effort to cultivate his part of said lands during the years of 1907, 1908 and 1909.

(20) That by reason of the premises the lands of the claimants which before the undertaking by the United States to improve the river were, from their natural situation, comparatively high and secure from overflow, and were flowed only three times in the twenty years from 1870 to 1890, have been flowed by the flood waters of the river, thus confined, in the years 1890, 1891, 1892,

1893, 1897, 1898, 1899, 1903, 1904, 1906, 1907, three times, and in 1908 continuously for a period of 120 days, and three times successively in 1909, when with the volume of flood waters in the river they would not have been so flowed, except for the works of the United States aforesaid, and the crops growing and grown thereon have been each year destroyed by said overflows, so caused, and the live stock drowned, and the buildings, fences and other improvements undermined and washed away, and the drains and ditches filled up, and the soil washed off, and the lands covered with superinduced additions of water, earth, sand and gravel, so as to render them unfit for cultivation, and to entirely destroy their value.

(21) And your petitioners say that this precipitation and this backing of the flood waters of the river, by the works of the United States for the improvement of the navigation of the river, so as to flow the lands of the petitioners, and to destroy the crops growing and grown thereon, and to drown the live stock, and to wash away the buildings, fences and other improvements, and to fill up the drains and ditches, and to wash off the soil, and to cover the lands with superinduced additions of water, earth, sand and gravel, so as to render them unfit for cultivation, and to entirely
23 destroy their value, is such a serious interruption to the common and necessary use of the property as to be equivalent to a taking within the meaning of the Constitutionl provisions, and being done in pursuance of the acts of Congress, authorizing it for the public benefit, and under the direction of the Mississippi River Commission, and the Secretary of War, by the officers and agents of the United States, after adopting and utilizing levees built by state and local authorities, imposes on the Federal Government an implied obligation to make compensation for the property so taken and destroyed.

(22) That no other action than as aforesaid has been had on this claim in Congress or by any of the Departments.

(23) That the claimants are the sole owners of this claim, and the only persons interested therein; and that no assignment or transfer of this claim, or any part thereof, or interest therein has been made.

(24) That the claimants are justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets.

(25) That the claimants are citizens of the United States, and believe the facts stated in this petition to be true.

And the claimants ask judgment for said sum of three hundred thousand dollars ($300,000.00).

MATTIE W. JACKSON, *Widow*, AND
WILLIAM GRAHAM JACKSON, AND
GLADYS L. JACKSON,
*Infants, Who Sue by Mattie W. Jackson, Their Next Friend*, AND
ERNEST H. JACKSON,
*Petitioners*,
By WAITMAN H. CONAWAY,
*Attorney for Petitioners*

DISTRICT OF COLUMBIA,
*City of Washington, ss:*

Personally appeared before the undersigned authority, John Randolph, Assistant Clerk of the Court of Claims of the United States, Waitman H. Conaway, who being by me first duly sworn, upon his oath says, that he is the attorney of record for petitioners in the above styled case in the Court of Claims under and in pursuance of a power of attorney in writing, duly executed by petitioners and filed in said suit on the 12th day of October, 1911; that he has read the above petition and is acquainted with the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

WAITMAN H. CONAWAY,
*Attorney of Record.*

Subscribed and sworn to before me this 25th day of January, A. D. 1912.

JOHN RANDOLPH,
*Assistant Clerk Court of Claims.*

24 *VII. Traverse.*

Filed March 15, 1912.

In the Court of Claims of the United States, December Term, A. D. 1911.

No. 18274.

MATTIE W. JACKSON et al.
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
*Assistant Attorney General.*

*VIII. Further History of Proceedings.*

On May 6, 1912 claimants' motion for new trial overruled; claimants' motion to amend findings of act allowed in part and overruled in part; amended findings of fact and revised opinion by Booth, J., this day filed, nunc pro tunc, as of December 4, 1911. The judgment as entered to stand. Howry and Barney, JJ. dissenting.

On May 8, 1912 the claimants filed a motion to amend findings of fact.

On June 17, 1912 the Court filed an order setting aside order of May 6, 1912. Claimants' motion for a new trial allowed. Claimants' and defendants' motions to amend findings allowed in part and overuled in part. Former findings and opinion withdrawn new findings this day filed with conclusion of law dismissing petition. Opinion by Booth, J. Howry and Barney, JJ. dissenting,

Said findings and opinions are as follows:

25 *IX. Findings of Fact and Conclusion of Law and Opinion by Booth, J., and Dissenting Opinions by Howry and Barney, JJ.*

Filed June 17, 1912.

MATTIE W. JACKSON, Widow; WILLIAM GRAHAM JACKSON and GLADYS L. JACKSON, Infants; and ERNEST H. JACKSON

v.

THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following:

## Findings of Fact.

### I.

The alluvial valley of the Mississippi extends from Girardeau, Mo., on both banks, to the Gulf of Mexico, varying in width from 4 to 40 miles above the mouth of Red River, and to a much greater distance below.

It is topographically divided into six large basins, of which four are on the west bank and two on the east bank, and into many small basins.

The St. Francis Basin extends from Cape Girardeau to Helena, Ark.

On the west bank at Helena the White River Basin begins and extends to the mouth of the Arkansas River, and there are no highlands on the west bank of the river near the mouth of the Arkansas River, and but for that river there is no natural physical line of demarcation between White River Basin and the Tensas Basin.

Below the Arkansas River and still on the west bank lies the Tensas Basin, extending to the mouth of Red River, and there are no highlands, on the west bank of the river near the mouth of the Red River, and but for that stream there is no natural physical line of demarcation between the Tensas Basin and the Atchafalaya Basin.

From Cairo to a short distance below Memphis, Tenn., on the east bank, the hills crowd closely to the river and form small basins, which prevent any large escape of high water.

On the east bank, a short distance below Memphis, the Yazoo Basin begins, and extends to Vicksburg, Miss.

On the east bank from Vicksburg to Baton Rouge the highlands

abut on the river at Grand Gulf, Rodney, Coles Creek, Natchez, Ellis Cliff, Fort Adams, Tunica, St. Francisville, Port Hudson, and Baton Rouge, still further dividing this stretch of territory into smaller basins.

Below the Red River, and still on the west bank, the Atchafalava Basin extends to the Gulf, and on the east bank the Pontchartrain Basin extends from Baton Rouge, La., to the Gulf.

These small basins on the east bank are shallow, and there is no escape for the flood waters of the river which flow into them, except to return to the river at and above the foot of each basin.

The Jackson lands are situated at Jackson Point, in the Homochitto Basin, on the left bank of the river, 40 miles below Natchez and 25 miles above the mouth of Red River, and are located within the limits of a narrow strip of land lying between the Missis-
26 sippi River and the highlands east of it between Vicksburg and Baton Rouge, where the highlands abut on the river at Grand Gulf, Rodney, Coles Creek, Natchez, Ellis Cliff, Fort Adams, Tunica, St. Francisville, Port Hudson, and Baton Rouge, and said lands are not and have not been protected by levee construction other than that built by claimants, which has been destroyed by flood waters in recent years.

II.

Mary E. Jackson owned and possessed during her lifetime and at the time of her death the plantations described in the petition as Jackson Point, Alloway, Cerro Gordo, and Black Hills.

By the last will and testament of Mary E. Jackson, bearing date September 25, 1887, she devised said lands to her son, E. H. Jackson, and appointed her husband, William L. Jackson, testamentary executor, but her husband, as provided by the statutes of Mississippi, renounced the will and took a child's portion, and he and his son, E. H. Jackson, acquired the lands as tenants in common.

William L. Jackson died in 1895, testate, and by his last will and testament, bearing date January 19, 1896, devised one-fourth of his interest in said land to said E. H. Jackson and the other three-fourths interest in said land to his widow (he having been married a second time), Mattie W. Jackson, for life, with remainder in fee to William Graham Jackson and Gladys L. Jackson, the two children of the marriage, the widow administering on his estate.

III.

Said land was partitioned among the owners thereof by judicial decree of the chancery court of Adams County, Miss., on December 15, 1896, each of the tenants taking his and her shares in severalty, said E. H. Jackson taking five-eighths and said Mattie W. Jackson taking three-eighths, and since that time said lands have been cultivated in severalty.

The decree of the chancery court of Adams County, Miss., entered December 15, 1896, confirming the commissioners' report partitioning said lands, describes the same as follows, to wit:

To Mattie W. Jackson, as follows:

"1st. That certain plantation of land commonly known as 'Cerro Gordo,' situate in said county of Adams and State of Mississippi, in 'Dead Man's Bend' on the Mississippi River, said plantation being bounded on the north by lands of the estate of Wm. McElroy, on the east by lands (formerly) of Holliday & Graham, on the south by lands (formerly) of W. H. Dunbar, and on the west by the Mississippi River, containing 200 acres, more or less.

"2nd. That certain tract of land situate in said State of Mississippi, county of Adams, on the Mississippi River, known as the 'Black Hills' plantation; bounded on the north by said Mississippi River; east and south by lands formerly of Mary E. Jackson, deceased, and Annie M. Helvey, and west by lands of Jacob Miller, containing 57.25 acres, more or less, and with courses and distances as shown by a certain map of record in Book 3-E, page 609, of the records of deeds of said county of Adams, made by C. W. Babbit, C. E., being the same tract of land sold and conveyed to Ernest H. Jackson and William L. Jackson, deceased, by Henry Frank, trustee, by deed dated the 5th of December, 1892, and recorded in Book 3-H, page 733, of said records of deeds.

27 "3rd. All that certain plantation of land lying, being, and situate in the county of Adams, State of Mississippi, on the Mississippi River, in that portion of said county known as 'Dead Man's Bend,' said plantation being called and known as 'Alloway,' and containing, with the exceptions hereinafter mentioned, the following tracts, to wit:

"The south half, the northwest quarter, and the west half of the northeast quarter of section six (6), township three (3), range four (4) west, containing 568.27 acres entered by Thos. Lewis, Polly Williams, W. H. Edwards, and Leo Tarleton. Also lots one (1), two (2), three (3), and four (4), fractional section eighteen (18), township four (4), range four (4) west, containing 314.41 acres, entered by Samuel Martin and Lewis & Barnard. Also lot six (6) of fractional section one (1), township four (4), range five (5) west, containing 80 acres, entered by James Swing. Also the north half of section one (1), township three (3), range five (5) west, containing 322.50 acres. Also lots three (3), four (4), and five (5), township three (3), range five (5) west, containing 240 acres, in all about 1,524 acres (originally). Excepting, however, that certain piece or parcel of land containing 270 acres, set off to Ernest H. Jackson and more particularly described as follows, to wit:

"Beginning for northeast at a point on the Mississippi River at the north end of a ditch at a point designated A on said map; thence south 3° east along the center of said ditch about 28 chains to its southern end, where is planted an iron post on the bank, and on same course about 49 chains in all to an iron post planted on the south boundary of 'Alloway' at point marked B on said map; thence west through the middle of section 1, T. 4, R. 5, 48.20 chains to a large gum tree, at the point C on said map, on the west bank of a canal and marked x x, and old-established corner; thence north between sections 1 and 2, T. 3, R. 5 W., 40 chains to an iron post and

on 25 chains more, between sections 1 and 2 of T. 4, R. 5 W., to the bank of the Mississippi River at the point D on said map; thence southeasterly along the river to the place of beginning; being the tract shaded yellow on said map; and designated thereon by the words and figures '270 acres of Alloway set off to E. H. Jackson.'

To Ernest H. Jackson, as follows:

"1. That certain plantation of land, lying, being, and situated in said county of Adams, State of Mississippi, in that part of said county known as 'Dead Man's Bend' on the Mississippi River, called and known as 'Jacksons Point,' containing the following tracts, to wit:

"Lots one (1), two (2), three (3), four (4), five (5), and six (6) of fractional section two (2), township four (4), range five (5) west, containing 548 acres. Also the northwest quarter of fractional section two (2), township three (3), range five (5) west, containing 158.62 acres. Also fractional section three (3), township four (4), range five (5) west, containing 126 acres; in all, 832.62 acres; also the batture in front of said section 3, T. 4, R. 5 west, as shown on said map.

"2. All that certain piece or parcel of land containing 270 acres, heretofore a part of the 'Alloway' plantation, and more particularly described as follows, to wit:

"Beginning for northeast corner at a point on the Mississippi River at the north end of a ditch at the point designated A 28 on said map; thence south 3 degrees east along the center of said ditch about 28 chains to its southern end, where is planted an iron post on the bank, and on same course about 49 chains in all to an iron post planted on the south boundary of 'Alloway' at point marked B on said map; thence west through the middle of section, 1, T. 4, R. 5, 48.20 chains to a large gum tree, at the point C on said map, on the west bank of a canal marked XX, an old-established corner; thence north between sections 1 and 2 of T. 3, R. 5 W., 40 chains to an iron post, and on 25 chains more between sections 1 and 2 of T. 4, R. 5 W., to the bank of the Mississippi River at the point D on said map; thence southeasterly along the river to the place of beginning; being the tract shaded yellow on said map and designated thereon by the words and figures "270 acres of Alloway set off to E. H. Jackson.'"

The value of the Cerro Gordo plantation and a portion of the Alloway plantation, containing, in all, six parcels, aggregating 1,702.42 acres, more or less (being the land decreed to Mattie W. Jackson for and during her natural life, with remainder in fee to William G. Jackson and Gladys L. Jackson, the two children of her marriage with William L. Jackson), is $51,072.90.

The value of the lands decreed to Ernest H. Jackson, as set out above, being the Jackson Point plantation and a portion of the Alloway plantation, aggregating 1,102.62 acres, is $33,078.60.

## IV.

On the 30th day of December, 1899, Ernest H. Jackson purchased from George M. Brown and Rufus L. Learned, for the sum of $13,000, the Wakefield plantation, described in said deed of conveyance as follows:

"All that certain tract of land situated, lying, and being in the county of Adams, State of Mississippi, and now known as Wakefield plantation, being lot No. 3 of the original Wakefield plantation, which was allotted and set apart to Brown & Learned of the first part by the final decree of the chancery court of Adams County, rendered October 24th, 1891, in that certain partition suit styled Mary C. Dunbar et al. v. Ida Dunbar et al., numbered 1004 on the general docket of said court, said final decree being of record on pages 768-770 of Book 3-H of the records of deeds of said Adams County. Said lot No. 3 at time of rendition of said decree contained 240 acres of open land and 1,170 acres of batture, in all 1,460, as will appear from the map of Wakefield plantation filed in said cause and of record on page 451 of Book M of final records of chancery court, and it is described in said final decree as follows, to wit: Lot No. 3, beginning at SE. corner at corner of sections 4 and 5 post, where a china tree bears N. 7° E. 50 feet; thence with line of the Baker tract N. 1° 25′ W., 82 chains to SW. corner of lot No. 2 of Wakefield, and on same course with lot No. 2 about 30 chains to Canal Bayou; thence along Canal Bayou, and the middle of the slough previously mentioned, with lot No. 1 to NW. corner of lot No. 1; thence west with W. L. Jackson 7.00 chains to an iron post to mark the 1¼ section corner of sections 2 and 3; thence N. 1° 25′ W., still with W. L. Jackson, 40 chains to iron pin on township line to mark corner of 2 and 3; thence west on township line at 13.70 chains is stake in road, where a china tree bears N. 64° E. 48 links at 43 70/100, cross a wire fence 80.00 is on bank of Mississippi River, where
29 cottonwood XS. 25° E. 18.00 north 23.00 N. 38½ E. 35; thence down the river to south boundary of section 4 and with it east to the beginning; also all the batture and alluvial deposits lands now connected to or belonging to said lot No. 3 of original Wakefield plantation."

The value of the Wakefield plantation, containing 1,460 acres, is $43,800.

## V.

The basin in which the Jackson lands are situated commences at Ellis Cliffs, about 20 miles below Natchez, and extends to Fort Adams, about 50 miles below, with an average width of 2 miles and a maximum width of 6 miles, and is known as the Homochitto Basin.

In the report of the Mississippi River Commission for 1894 (pp. 2713-2714), to which reference is here made, when treating of the Homochitto levee district it says:

"The commission is also advised of the pendency of a suit in the Court of Claims by the owners of a plantation within said district

claiming damages for injury by overflow. * * * In the copy of the petition in said cause, furnished to the commission by the Department of Justice, it is alleged that the omission of the United States to construct levees along the front of the land of petitioners constituted an adoption of the bluff behind the lands for the purpose of the levees and an appropriation of petitioners' land for public use."

In 1895 and 1896 the Mississippi River Commission caused a complete survey to be made of the Homochitto levee district by Col. Derby, the engineer officer in charge. The report of Col. Derby will be found on pages 3472-3473 of the commission's report for 1896, and the maps made as a result of said survey will be found in Appendix 13 to said report, to all of which reference is here made. On page 3473 of said report, and on map (pl. 4) accompanying Col. Derby's report, it is shown that the claimants' lands are located in that small basin between Ellis Cliff and Fort Adams, and that the cost of building levees within that basin was at that time greater than the value of the land which such levees would protect and other lands would not be protected thereby.

In the report of the Mississippi River Commission for 1896 (p. 3418), to which reference is here made, the commission says:

"Since the date of the last report complete surveys of the several minor basins comprising this levee district have been made. The general conclusion from these is that the frontage of these districts along the river is so short that the back water of floods entering through the opening left at the lower end for local drainage of the basin, and that coming from the hills, will reach to the inner foot of the levee and submerge nearly, if not all, of the inclosed land.

"Complete reclamation of these lands is, therefore, only practicable by treating them as polders and establishing an artificial drainage by pumps and floodgates. The surveys further show that the cost of the levees in most cases far exceeds the value of the land. Their area is so small that it can hardly be contended that their leveeing is important to the improvement of the navigation of the river."

In the Homochitto levee district, from Vicksburg to Baton Rouge, on the east side of the river the foothills are so located as to serve, and do serve, the purposes of a levee line in said district in times of high water, and the Government has not constructed any levees in that district.

In the annual report of the Mississippi River Commission for 1910 (pp. 2937-2938), reference to which is here made, that commission in part says:

"The attention of Congress has been called in former reports, beginning as far back as 1894, to the situation of the narrow and irregular strip of land lying between the Mississippi River and the highlands east of it between Vicksburg and Baton Rogue—a distance of 234 miles by the river.

* * * * * * *

"It appears to the commission that there are three possible ways of dealing with the problem. One is to assist the owners of the inun-

dated lands by helping them to build levees where that method of protection is economically possible. Another is to compensate them in damages for the injuries which they have sustained. A third would be to buy the lands and devote them to forestry. There is more to be said in favor of the last of these suggestions than might appear at first blush. The lands are capable of growing many kinds of valuable timber. They could be made to produce much material for revetment and other works of improvement in the river. If the fields were abandoned to natural growth the land would be gradually built up by deposit and they might become highly valuable for cultivation."

During times of high water and overflow the water from the Mississippi River flows over the claimants' said land and leaves a deposit of silt and sand thereon and has done so during seasons of high water and during times of overflow, which is shown by the gauge readings for various years as far back as the year 1828, which is as follows:

| Years. | Cairo. | Helena. | Lake Providence. | Vicksburg. | St. Joseph. | Natchez. | Red River landing. |
|---|---|---|---|---|---|---|---|
| 1828 | ..... | 43.11 | ..... | 46.38 | ..... | 48.4 | ..... |
| 1844 | ..... | 42.21 | ..... | 46.18 | ..... | 47.8 | ..... |
| 1849 | ..... | 42.81 | ..... | 46.38 | ..... | 47.5 | ..... |
| 1850 | ..... | 42.81 | ..... | 47.08 | ..... | 45.3 | ..... |
| 1858 | 49.56 | 44.61 | ..... | 46.98 | ..... | 47.8 | ..... |
| 1859 | 46.8 | 43.61 | ..... | 48.28 | ..... | 49.0 | ..... |
| 1862 | 50.76 | 46.40 | 40.87 | 51.10 | ..... | 50.3 | ..... |
| 1865 | 47.9 | 44.40 | ..... | 46.43 | ..... | ..... | ..... |
| 1867 | 51.0 | 45.82 | 39.99 | 49.02 | ..... | 47.9 | ..... |
| 1868 | 45.6 | ..... | ..... | ..... | ..... | ..... | ..... |
| 1871 | ..... | ..... | ..... | ..... | ..... | 43.8 | ..... |
| 1872 | 39.20 | 39.03 | 35.15 | 39.50 | ..... | 39.85 | 39.42 |
| 1873 | 41.55 | 40.00 | 36.12 | 40.60 | ..... | 40.15 | 39.02 |
| 1874 | 47.37 | 45.82 | 37.37 | 45.70 | ..... | 45.60 | 47.0 |
| 1875 | 45.12 | 42.40 | 37.29 | 43.0 | ..... | 41.85 | 40.45 |
| 1876 | 46.38 | 44.85 | 37.95 | 44.90 | ..... | 43.85 | 45.41 |
| 1877 | 40.52 | 41.80 | 35.82 | 41.60 | ..... | 40.70 | 40.55 |
| 1878 | 37.04 | 38.75 | 35.80 | 40.95 | ..... | 39.2 | ..... |
| 1879 | 36.50 | 37.25 | 36.0 | 39.45 | ..... | 36.8 | 35.90 |
| 1880 | 44.60 | 43.70 | 38.05 | 43.15 | ..... | 43.5 | 44.05 |
| 1881 | 45.80 | 43.74 | 36.17 | 41.85 | 39.2 | 40 8 | 40.10 |
| 1882 | 51.87 | 47.20 | 38.32 | 48.75 | 44.9 | 47.75 | 48.50 |
| 1882 | 52.17 | 46.90 | 36.47 | 43.80 | 41.9 | 44.0 | 45.20 |
| 1884 | 51.79 | 47.00 | 38.40 | 49.0 | 44.98 | 47.4 | 47.30 |
| 1885 | 39.0 | 40.70 | 35.55 | 42.4 | 38.37 | 42.6 | 41.96 |
| 1886 | 51.02 | 48.10 | 37.91 | 44.15 | ..... | 43.75 | 41.94 |
| 1887 | 48.50 | 46.40 | 38.01 | 44.70 | ..... | 44.2 | 43.0 |
| 1888 | 45.35 | 42.80 | 38.10 | 44.18 | ..... | 43.4 | 41.75 |
| 1889 | 34.53 | 34.10 | 29.40 | 34.45 | 30.60 | 34.15 | 33.94 |
| 1890 | 48.80 | 47.72 | 41.05 | 49.05 | 45.15 | 48.6 | 48.6 |
| 1891 | 46.21 | 44.70 | 41.00 | 48.10 | 43.80 | 46.5 | 45.5 |
| 1892 | 48.29 | 45.73 | 41.90 | 48.45 | 44.85 | 48.1 | 48.8 |

| 31 Years. | Cairo. | Helena. | Lake Providence. | Vicksburg. | St. Joseph. | Natchez. | Red River landing. |
|---|---|---|---|---|---|---|---|
| 1893 | 49.33 | 47.92 | 41.85 | 48.30 | 44.10 | 46.8 | 47.7 |
| 1894 | 37.0 | 38.07 | 34.40 | 40.90 | 36.90 | 40.6 | 39.05 |
| 1895 | 33.0 | 31.30 | 25.90 | 31.70 | 27.85 | 31.5 | 31.2 |
| 1896 | 39.2 | 38.42 | 33.25 | 39.0 | 35.15 | 38.2 | 37.4 |
| 1897 | 51.62 | 51.75 | 44.54 | 52.48 | 47.85 | 49.8 | 50.2 |
| 1898 | 49.78 | 49.11 | 44.35 | 49.4 | 45.06 | 47.4 | 44.3 |
| 1899 | 46.24 | 46.75 | 41.65 | 47.3 | 43.25 | 46.15 | 43.3 |
| 1900 | 39.17 | 38.25 | 32.95 | 38.0 | 33.7 | 37.0 | 36.3 |
| 1901 | 43.20 | 41.45 | 36.45 | 41.5 | 36.9 | 39.8 | 37.3 |
| 1902 | 42.14 | 39.58 | 34.95 | 41.22 | 37.15 | 40.25 | 38.8 |
| 1903 | 50.57 | 51.00 | 46.48 | 51.8 | 48.07 | 50.35 | 50.08 |
| 1904 | 49.01 | 47.62 | 42.5 | 46.85 | 42.75 | 45.50 | 43.7 |
| 1905 | 38.56 | 37.77 | 36.5 | 40.75 | 37.4 | 41.27 | 40.77 |
| 1906 | 46.90 | 47.05 | 43.7 | 47.15 | 43.75 | 46.7 | 44.7 |
| 1907 | 50.33 | 50.39 | 46.3 | 49.65 | 46.15 | 48.9 | 46.9 |
| 1908 | 45.55 | 45.2 | 44.1 | 47.8 | 44.75 | 48.9 | 48.74 |
| 1909 | 47.27 | 47.65 | 44.3 | 48.0 | 45.15 | 47.91 | 46.04 |
| 1910 | 42.2 | 40.7 | 36.9 | 40.6 | 36.3 | 39.8 | 38.5 |

VI.

The Jackson lands have been entirely overflowed in the years 1890, 1892, 1893, 1897, 1903, 1907, 1908, and 1909, and partially overflowed in the years 1891, 1898, and 1906, and only saved from overflow by the private levee of Jackson in 1899 and 1904.

That said lands were partially overflowed in 1906, overflowed three times in 1907, five times continuously in 1908 for a period of 129 days, and two times successively in 1909, it requiring a flood stage of 43 feet on the river gauge at Natchez to reach and flow the Jackson land.

The effect of the frequent and successive overflows in the years 1906, 1907, 1908, and 1909 was to drive away the tenants, cover 1,700 acres thereof with sand and silt deposits from 6 inches to 6 feet in depth; said land has grown up with weeds, young willows, and cottonwood from 6 to 15 feet in height; many of the buildings, houses, and cabins formerly on said lands have been lifted from their foundations and washed into the fields, the floors torn up, the fencing on said land washed away and torn to pieces by the swift currents of the water running over said land; and that said lands have been destroyed for agricultural purposes and have no market value.

VII.

Prior to the year 1890 the unprotected lands of claimants could be, and were, successfully and profitably cultivated during certain years. Since the year 1890, and by reason of the efforts of the United States to improve the navigation of said river along and in front of the land of claimants in the interest of navigation and commerce, in pursuance of various acts of Congress, and by closing up the natural outlets along said river existing prior to that time, the overflows from the waters of said river are now occurring at more frequent intervals and for a longer duration.

From 1870 to 1890 there had been great floods in the years 1874, 1882, and 1884, which partially and fully flowed the Jackson lands, but that the occurrence of such overflows did not materially affect their productive capacity or impair their value.

32 VIII.

All the efforts of the State and local authorities on the west bank of the Mississippi River, near the land of claimants, had never succeeded in erecting and maintaining levees on that bank sufficiently high and strong to hold the flood waters in the channel of the river, and therefore claimants' lands were flowed for a short time only, the waters escaping through the natural outlets and crevasses into the basins and from said basins into the Gulf of Mexico.

The combined work of the United States, States, local authorities, corporations, and private owners did not succeed in preventing crevasses in the general levee system along the Mississippi River until the year 1908, the first flood year without a crevasse in the levees.

IX.

From time immemorial the waters of the Mississippi River during the highest stages thereof, when not contained within the low-water banks of the river, naturally found outlet below Cairo into the St. Francis Basin and below the highlands near Helena, Ark., in the White River, Yazoo, Tensas, Atchafalaya, and Pontchartrain Basins, and through the rivers draining these basins eventually into the Gulf of Mexico. The outlets and drains thus provided by nature were such as to accommodate said flood waters, and the lands of claimants were not overflowed as frequently before the outlets were closed by levee construction by the United States to improve the river navigation, and by the State and local authorities to protect and reclaim land subject to overflow in times of high water, and consequently were but little injured by said overflows.

X.

Prior to the year 1883 the States and local authorities had constructed unconnected lines of levees for the protection and reclamation of lands subject to overflow from the mouth of Red River to the mouth of Arkansas and from the mouth of the Yazoo to the highlands below Memphis. The flood waters of 1882 destroyed miles of these levees.

Beginning about the year 1883 and continuing to the present time, the officers and agents of the United States, pursuant to an act of Congress creating the Mississippi River Commission and the other acts amendatory thereof, and for the improvement of the Mississippi River for navigation, adopted a plan, the so-called Eads plan, and in consequence thereof have projected and constructed and maintain- and are now engaged in constructing and maintaining certain lines of levees on both sides of the river at various places for various distances from Cairo, Ill., to near the Head of the Passes, a distance of 1,050 miles by river from Cairo, and the local authorities or organizations of the States bordering along the river on both sides from Cairo to the Gulf have before and since 1883 constructed and are now constructing and maintaining certain lines of levees at various places and of various lengths for the purpose of protecting and reclaiming lands within their respective districts from overflow in times of high water.

33 The levee lines so constructed by the United States and local authorities have been joined, thus giving a continuous line of levees, as contemplated by the Eads plan, with the result that the flood waters of the Mississippi River to a great extent are confined within and between said levee lines and encompassed within a narrower scope than heretofore, acquired an increased velocity and higher elevation and the current thereof has become stronger and more forceful.

The plan of the officers and agents of the United States so acting was to increase said velocity and scouring power of the water and to scour and deepen the channel of the Mississippi River and thereby improve it for navigation, and the purpose of the officers and agents

of the State and local authorities constructing lines of levees at various points along and on both sides of the river was to reclaim and to protect land from overflow in times of high water. By so doing, the waters being thus confined within a narrower compass, as above indicated, have attained a higher elevation of approximately 6 feet in times of high water.

## XI.

From Cairo, Ill., to near the mouth of the Yazoo River, just north of Vicksburg, the Mississippi River is practically leveed on both sides, except on the east side, where the highlands abut on or near the river in Kentucky and Tennessee (from Port Jefferson, Ky., to a short distance south of Memphis, Tenn.) and thence on the west side to near the Head of the Passes, or to a point 1,050 miles by the river from Cairo, and on the east side from Baton Rouge to the same point near the Head of the Passes, leaving a gap in the line of levees of 234 miles in length, from the mouth of the Yazoo River to Baton Rouge, unleveed, where the foothills in some places hug closely to the east bank of the river, and at other points are from 2 to 6 miles from the river, in which strip of territory the lands of claimants are located between the highlands and the river, as before stated.

The extension of the general levee system by the United States and the local authorities, since the United States adopted to its use and assumed "permanent control" of the levees theretofore constructed by State and local authorities, has resulted in an increased elevation of the general flood levels, which subjects the claimants' lands to deeper overflow than they were subject to formerly, or would be subject to now, if the levee system were not in existence, and consequently has destroyed its value for agricultural and grazing purposes, causing its abandonment for that purpose since the year 1908. The immediate cause of the deeper overflow of claimants' land is the increased elevation of flood heights which is the result of the general confinement of the flood discharge by the levee system as a whole.

## XII.

During the flood waters of 1882, the levees failed throughout the length of the river. In 1884, the crevasses were still open in the basins. In 1886, crevasses were open in the Upper Tensas district and the levees practically intact in the Lower Yazoo district opposite the Upper Tensas. In 1887, all crevasses were closed. In 1890, there were eight crevasses in the Upper Tensas and seven in the Lower Yazoo districts. In 1891, all 1890 crevasses were closed and the flood waters of that year made one crevasse in the Upper
34 Tensas and one in the Lower Yazoo districts. In 1892, all crevasses were closed, but the flood waters made six crevasses in the stretch of river in the Upper Tensas district. In 1893, all crevasses were closed, but the flood waters of that year made four crevasses. In 1897, all crevasses were closed, but the flood waters of that year made five crevasses in the Lower Yazoo district in Mississippi. From 1898 to 1902, there were no crevasses, and only one crevasse in the Upper Tensas district in 1903, and all crevasses closed from 1904 to 1910.

## XIII.

Before the joining of the levee lines by the United States in accordance with the Eads plan (thus making the same continuous), there were occasional overflows of claimants' land, but they have been made deeper, more frequent and more forceful by the adoption and completion of the levee system. However, these overflows, before the adoption of said system, did not materially damage said land and it remained still valuable for agricultural purposes.

## XIV.

From 1896 to 1908 there was raised and sold on the Jackson land the following crops of cotton:

| Season. | Bales. | Value. | Season. | Bales. | Value. |
|---|---|---|---|---|---|
| 1896-97 | 707 | $25,960.42 | 1903-4 | 230 | $14,781.36 |
| 1897-98 | 481 | 12,508.26 | 1904-5 | 564 | 25,943.54 |
| 1898-99 | 317 | 10,525.71 | 1905-6 | 571 | 34,388.80 |
| 1899-1900 | 567 | 28,265.51 | 1906-7 | 858 | 56,648.03 |
| 1900-1901 | 645 | 26,408.73 | 1907-8 | 563 | 35,620.47 |
| 1901-2 | 836 | 33,799.71 | | ? | |
| 1902-3 | 518 | 23,153.44 | Total | ... | 328,003.98 |

During this time the levee line closing the Bougere crevasse opposite the Jackson lands had not been constructed, it being commenced in 1902 or 1903 and completed in 1910, and the levee system had not reached that state of completion which now exists, and claimants, with the aid of their private levees, now destroyed and washed away, and by replanting after overflow, were able to raise crops of the above value. By offsetting profits against losses from the cultivation of said land during the period from 1896 to 1907, inclusive, said lands were not profitably cultivated. Considering the number of acres of land cultivated by claimants and the amount realized from the sale of crops for said years, it cost about $25 per acre to plant, cultivate, and gather a crop of cotton.

## XV.

Before the creation of the Mississippi River Commission by act of Congress, and the adoption of the Eads plan as aforesaid, the levee lines along the Mississippi River theretofore constructed by State and local authorities consisted of a broken chain of levees of insufficient height and strength to confine the flood waters, and had been built without regard to a uniform grade line. The United States then caused a survey and report to be made by its officers and agents showing the condition and location of levee lines theretofore constructed by State and local authorities as they then existed.
35 This survey suggested a proposed continuous system of levees from Cairo to the Head of the Passes. In many instances it was a blanket survey which encompassed and took in the lines of levees theretofore constructed by State and local authorities as above stated. The project recommended by the Mississippi River Commission adopting the Eads plan for the systematic improvement of the river from Cairo to the Head of the Passes was practically adopted by act of Congress approved March 3, 1881. The United States then undertook the projection and completion of a continuous line of

levees from Cairo to the Head of the Passes, as suggested by this survey and the Eads plan, and as recommended by the Mississippi River Commission, and, in furtherance of that plan and as part of and supplementary thereto, adopted to its use, and is now using, the levees theretofore constructed by State and local authorities, thereafter making them much larger and stronger. Since that time, levee construction, whether done by the United States or State and local authorities, has been in conformity with the grades and methods of construction adopted by the Mississippi River Commission, and the efficiency of the levee system has been largely due to this fact.

The extension of this levee system by the United States from Cape Girardeau, Mo., to the Head of the Passes was authorized by act of Congress in 1906. (34 Stats. L., p. 208.)

The construction of the levees made the high-water bed narrower and was followed by increased flood heights, which made it necessary to build the levees higher and stronger from time to time. The grade established by the Mississippi River Commission to which levees should be built was from 2 to 5 feet higher than the highest known water until June, 1910, when that grade was changed by the Mississippi River Commission *to* 3 to 5 feet above the highest known water, and since then the levees have been raised or constructed in accordance with that grade.

## XVI.

In the upper Tensas district, beginning at Amos Bayou, about 17 miles north of Arkansas City, and thence down to the Louisiana line, the United States had practically constructed the entire system, closing the upper Tensas Basin, having built 3,098,606 cubic yards, against 304,014 by local authorities, and added 1,202,884, against 41,187 by local authorities.

The following table, compiled by the Mississippi River Commission, 1893, shows the yardage erected in said district:

| | Cubic yards. |
|---|---|
| In levees in 1882 | 1,788,301 |
| Built by the United States Government to June 30, 1892 | 3,098,606 |
| Built by the Tensas Basin levee board, 1891-92 | 176,073 |
| Built by Desha levee board, 1891-92 | 27,941 |
| Built by Chicot levee board (estimated) | 100,000 |
| | 5,190,924 |
| Less levees abandoned 1888-92 | 642,000 |
| Total yardage in levees in 1892 | 4,548,924 |
| Levees built by United States Government to June 30, 1893 | 1,202,884 |
| Levees built by Tensas levee board, 1893 | 41,187 |
| Total | 5,792,995 |
| Less levees abandoned in 1893 | 150,000 |
| Total yardage in levees in 1893 | 5,642,995 |

36 XVII.

The work of levee improvement continued and to June 30, 1910, the commission had allotted to levees $27,927,329.40.

The Bougere crevasse was closed and the levee line extended down to a point near the mouth of Red River.

The Bougere crevasse is opposite the claimants' lands, and the crevasse occurred during the flood of 1859. It remained entirely open until 1902 or 1903, when efforts to close it commenced, since when it has been practically closed by the United States and the local authorities extending the levee line downstream to a point near the mouth of the Red River.

This levee closing the Bougere crevasse is 29 miles in length and 23.4 feet in height, furnishing a continuous line of levee opposite the Jackson lands. It was completed June 28, 1910. Its effect in flood times is and will be to produce an increased flood stage of about 4 feet of water on the Jackson lands in addition to the increased elevation of 6 feet in the flood height.

The levee line immediately above and below the claimants' lands which resisted the flood waters of 1908 was constructed in part by the United States and in part by the local authorities.

The levee opposite claimants' land was constructed by United States authorities alone.

## XVIII.

The effect of closing the natural outlets along said river and confining the flood waters between the improved levee system by the United States and the local authorities to improve the river for navigation and to reclaim and protect the lands along the Mississippi River, respectively, is to obstruct the natural high-water flow of the waters of said river in and along its natural bed along and in front of the lands of claimants, thereby raising the level of the water of said river to the extent that when there is now a flood tide the waters of said river more frequently, but, as before levee construction, accumulate, flow upon, and remain standing upon and over said land for a longer period than it did prior to said levee construction, so that the claimants are now interrupted in the profitable use, occupation, and enjoyment thereof during the seasonable months of the years of overflow, and as a result of said water being now held on said land for a longer period than it remained prior to said levee construction and prevented from immediately flowing off, as it was wont to do before said levee construction, part of the said land, about 1,700 acres, has now become covered with additional superinduced additions of sand and silt, rendering that part of said land unfit for profitable cultivation and destroying its market value.

### *Conclusion of Law.*

Upon the foregoing findings of fact the court decides as a conclusion of law that claimants are not entitled to recover judgment against the United States, and their petition is therefore dismissed.

37 *Opinion.*

BOOTH, J., delivered the opinion of the court:

The question now before the court arises on claimants' and defendants' motion to amend findings and for a new trial.

This is one of a class of cases involving an alleged taking of private land in the course of the improvement of the Mississippi River by the United States in aid of navigation. The original petition was filed in 1894 in which the ad damnum was stated at $107,257.50. Defendants' demurrer to this petition was overruled in 1896 (31 C. Cls., 319), since which time three supplemental petitions have been filed increasing the aggregate damages claimed to $569,702.50. The lands of claimants lie on the east bank of the Mississippi River, about 40 miles below Natchez, in Adams County, Miss., embracing a total of 4,265.05 acres, segregated by description into four plantations, as follows: Cerro Gordo, Black Hills, Alloway, and Wakefield. The petition alleges that prior to the year 1890 said plantations were comparatively high and so situated as to be exempt from the overflow waters of the Mississippi River except at long intervals, and that the occurrence of such overflows did not materially affect their productive capacity or their value; that about 1883 the officers and agents of the United States, in pursuance of an act of Congress creating the Mississippi River Commission, and by subsequent acts passed to aid in the improvement of the navigation of said stream, have projected and constructed, and are now constructing a system of public works, consisting of levees and embankments, for the purpose of confining the flood waters of said river between the lines of said levees and embankments, thereby securing an increased elevation and force to the current of said river in order to scour and deepen the channel; that in the prosecution of said work by the officers of the commission, they have adopted and made use of the various State systems of public levees and private levees constructed for the reclamation of overflowed lands lying alongside the river wherever the same are available; that on the east side of said river from Vicksburg to Baton Rouge no levees have been constructed, the officers of the commission availing themselves of the highlands skirting the same and have adopted the lands between the levees on the west and the foothills on the east as the channel of the river, and the lands here claimed for lie therein. The petition concludes with a general averment that as a result of the adoption of the Eads plan, involving the reclamation of the flood waters of the river by the erection of levees and embankments and detouring same into its channel, it has thereby increased its flood heights to such an extent as to annually inundate the premises of the claimants, destroying their value as agricultural lands, and leaving thereon a deposit of silt and sand of such proportions as to force their abandonment.

Claimants' contention rests entirely upon the assertion of a right under the fifth amendment to the Constitution of the United States to compensation for private property appropriated by the United States for governmental purposes. The defendants interpose two

defenses. First, that the damages accruing were consequential in character, and second, that the public works complained of were constructed by the cooperation of the United States and the various local authorities, with no means at hand to ascertain the extent of their respective liabilities.

38 The distinction between consequential damages occasioned riparian owners by the construction of governmental public works in navigable streams, and a taking of private property in furtherance of the same, is most generally a difficult and nice question of law. The rule is well settled that where officers of the United States appropriate to a public purpose the private property of another, admitting it to be such, an implied obligation arises to pay for the same. (South Carolina v. Georgia, 93 U. S., 4; United States v. Great Falls Manufacturing Co., 112 U. S., 645; United States v. Lynah, 188 U. S., 445.)

In Pumpelly v. Green Bay Company (13 Wall., 166) the Supreme Court overruled a contention that a taking of private property within the meaning of the fifth amendment to the Constitution was limited to the identical lands physically taken, and extended the liability in such cases to other lands actually invaded by "superinduced additions of water, earth, sand, or other material * * * so as to effectually destroy or impair its usefulness." In the Pumpelly case the lands involved were totally submerged by overflow waters and had been so since the completion of the public works and for at least six years subsequent thereto; they were adjacent to the impediment placed by the defendants across the stream and were so situated that the result of the improvement was to retard the natural flow of the water and accumulate such a volume of same at the situs of the works as to back up the overflow upon and over the plaintiff's lands. It in effect amounted to a physical invasion and a practical ouster of the plaintiff's possession. To the same effect are United States v. Great Falls Mfg. Co. (112 U. S., 645); United States v. Lynah (188 U. S. 445); United States v. Williams (188 Ib., 485).

In the Lynah case, supra, a case especially relied upon by the claimants, the findings show, and from the opinion it is clearly deducible, that it is not a departure from the previous rulings of the court upon this subject. Mr. Justice Brewer, in speaking for the court says: "It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclamable bog; and this as the necessary result of the work which the Government has undertaken." While there was dissension as to the full import of the findings, there was no dispute as to the rule of law. Again it is observable that in the Lynah case the improvements complained of were placed in the bed of the river having the same disastrous effects as in the Pumpelly case.

In United States v. Welch (217 U. S., 333) and United States v. Grizzard (219 U. S., 180) the Supreme Court extended the quantum of compensation recoverable for an actual physical taking of private property under the fifth amendment so as to embrace not only the market value of the lands actually taken, but to the remainder af-

fected by such invasion, including the right of access to a public road destroyed by permanent flooding.

While what constitutes an actual taking is difficult of ascertainment, it is clear from the opinions that to constitute an actual taking there must be an actual invasion of the lands amounting to a practical ouster of claimant's possession, an actual overflow of such a permanent character as to imply an intent to take, and a correlative obligation to pay for the lands so taken. Peabody v. N. S.
39 (43 C. Cls., 5). The Supreme Court has said that "the acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the constitutional provision." In Transportation Company v. Chicago (99 U. S., 635)—from which the above quotation is taken—the court held the municipality exempt from liability for damages unavoidably caused an adjoining property owner by obstructing a street and a portion of the river in the course of constructing a tunnel under the Chicago River.

Numerous decisions covering the entire scope of consequential injuries as distinguished from the taking under the fifth amendment of the Constitution, are discussed and cited in the case of Heyward v. United States (46 C. Cls., 484); it is unnecessary to again discuss them here.

In Bedford v. United States (192 U. S., 225)—a case of extreme significance to the issue here raised—the Supreme Court in distinguishing the difference between consequential damages and a taking of private lands for public purposes, declined to attach responsibility to the Government for constructing certain improvements in the Mississippi River in such a way as to result in a complete and permanent submerging of certain portions of the claimant's lands. The findings of the court in the Bedford case disclose the following situation: Prior to 1876 the channel of the Mississippi River was around a narrow neck of land known as De Soto Point; in the spring of that year De Soto Point, yielding to constant erosion and the force of the current of the river, became so narrow that the river broke through, thereby detouring the main channel from in front of the city of Vicksburg to a distance some miles away in a southerly direction. The effect of this complete change in the channel of the river was to force the water with great velocity against the Mississippi bank at what is known as the cut-off of 1876. The United States in 1878 and subsequent years, in pursuance of acts of Congress, erected along the new banks of the river near the cut-off some 10,700 feet of revetments, the purpose being to prevent further erosion of the banks of the new-made channel, which, if continued, would necessarily carry the main channel of the river farther away from the city of Vicksburg. In the consummation of this purpose and because of the revetment work the waters of the river were deflected toward the land of the claimant, situated some 6 miles below the same, and subsequently permanently submerged them. In answering the plaintiff's contention, the opinion uses the following language:

"The contention asserts a right in a riparian proprietor to the unrestrained operation of natural causes, and that works of the Government which resist or disturb those causes, if injury result to riparian owners, have the effect of taking private property for public uses within the meaning of the fifth amendment of the Constitution of the United States. The consequences of the contention immediately challenge its soundness. What is its limit? Is only the Government so restrained? Why not as well riparian proprietors; are they also forbidden to resist natural causes, whatever devastation by floods or erosion threaten their property? Why, for instance, would not, under the principle asserted, the appellants have had a cause of action against the owner of the land at the cut-off if he had constructed the revetment? And if the Government is responsible to one landowner below the works, why not to all landowners? The principle contended for seems necessarily wrong. Asserting the rights of riparian property it might make that property valueless. Conceding the power of the Government over navigable rivers, it would make that power impossible of exercise, or would prevent its exercise by the dread of an immeasurable responsibility."

We have given at length and in great detail the substantially agreed upon findings respecting the hydraulics of the Mississippi River. The evidence upon which they are predicated consists of the numerous reports of the Mississippi River Commission and various other reports of the authorized officers of the Government in the course of said work. From said findings it is apparent that said stream from Cairo, Ill., to the Gulf of Mexico is one of great sinuosity; its innumerable bends with scarcely a single line of direct current have made it susceptible to great overflows in times of anything like abnormal conditions. In fact, overflows are so frequent, and the use of riparian lands for agricultural purposes so precarious, that it is indispensable to protect them by lines of levees and embankments. The alluvial valley of the river extending from Girardeau, Mo., to the Gulf of Mexico has been divided into six large basins (four on the west bank and two on the east); through the medium of these large and extensive formations the flood waters of the stream have from time immemorial been discharged, passing consecutively from one to the other until they reach the Gulf. Within the limits of the respective basins are millions of acres of alluvial lands which have been at least partially reclaimed by the construction of private levees or their inclusion in local levee districts formed under local laws. These vast drainage basins in their natural state have in themselves been of inestimable value to the riparian owners of lands not situated therein, for the flood waters of the river escaping through them rapidly absorbed the surplus waters suddenly projected upon the higher lands and saved them from extreme injury.

The lands here involved are situated at the southeastern limits of the Lower Tensas Basin opposite what is known as the Bougere Crevasse. They are not protected or reclaimed by levees and lie in that extensive zone some 253 miles in length extending from near Vicksburg, Miss., to Baton Rouge, La., on the east side of the river

where the Government has not seen fit to construct any levees or embankments or any other improvements to aid in the navigation of the river, the nearest Government levee to claimants' land being on the opposite side of the river in the State of Louisiana and the nearest Government levees on the east bank, one being 157 miles north and one 96 miles south in the State of Mississippi. They are alluvial lands situated within the Delta of the river, and have been and of necessity must have been subject more or less to the overflow waters of the river. It is conceded that there is nothing peculiar in their location and that they have always been subject to overflow in times of high water. They lie, it is true, between the banks of the river on the west and the so-called highlands or foothills of the river on the east. The Bougere Crevasse occurred during the flood of 1859, and until it was subsequently closed served in part at least as a
41 channel through which the flood waters upon claimants' lands were speedily reduced.

The United States in the creation of the Mississippi River Commission and the numerous appropriations granted to forward the work, contemplated a most comprehensive scheme involving the reclamation of the flood waters of the river, and by a system of levees and embankments erected upon the banks of either side of the same to prevent its overflow, confine this enormous volume of water in the main channel of the river, thereby securing an increased velocity to the current, which would eventually deepen the channel. The mere assertion is sufficient demonstration that as a result of this project the flood heights of the river would be materially increased, for it is quite apparent that the enormous volume of water previously escaping through these immense basins having been deflected into the main channel of the river would result in causing lands unprotected by levees or embankments to be subject to more frequent and indeed more serious inundations. In the prosecution of this general plan the United States have made use of and are now using the levees available for the purpose which were constructed by private owners of land or by State and local drainage districts. They have also connected this necessarily disjointed system of levee improvement by constructing new levees and embankments where none heretofore existed, until at present they have substantially a continuous line of levees on the west bank of the river from some distance south of Cairo, Ill., to the Gulf of Mexico, and at such points on the east side as in the judgment of the engineer officers of the Army serve the purposes of the improvements.

The findings show, and it is conceded, that as a result of the system employed by the United States, in connection with the State and local authorities, the lands of the claimants have been and are now more frequently overflowed than before the construction of the levees. It is indisputable that a large portion of claimants' plantations have been practically destroyed for agricultural purposes by additional superinduced deposits of silt and sand of sufficient depth to render some portions of them valueless. It is not questioned that the claimants involved have suffered great loss in their inability to

annually harvest crops or cultivate to maturity the products usually raised upon said lands.

One contention of the claimants extremely vital to the case, set forth in the petition and emphasized in the briefs, fails for want of proof. It is this, that the Mississippi River Commission has adopted as the main channel of the river from Vicksburg to Baton Rouge the lands between the levees on the west and the highlands on the east, and for this reason have not constructed any levees or embankments on the east side of the river. To sustain this contention the court must indulge an inference from the general plan of the public works. There is an utter absence of any such express intent found in the numerous reports of the commission. The officers of the commission have upon numerous occasions in their reports urged upon Congress some equitable legislative relief for the numerous sufferers in this particular locality, and have described in detail their unfortunate situation and predicament, but we have been unable to find (and certainly can not conjecture) that it was part of the
42 general plan of improvement to appropriate as the channel of the river this most extensive area of private lands extending along the river bank to a total length of some four or five hundred miles, increasing the width of the channel in some instances more than a mile. The damages would indeed be immeasurable and the court could not sustain the judgment asked for in the absence of strong and convincing proofs. The testimony to sustain such contention, if it could be sustained, is easily accessible from living witnesses, and so clearly subject to positive proof that inferences and implications from other testimony in the record are unwarrantable. It would indeed be an anomalous proceeding to predicate a judgment for hundreds of thousands of dollars upon an ex parte report found in official reports to Congress of the Mississippi River Commission. The discussion of this subject unanimously approved in the first opinion of the court was sufficient warning to claimants that the court was unwilling to rest this particular contention upon the evidence introduced to sustain it. The intentional taking of a vast acreage of lands is a transaction quite too solemn to depend for adjudication upon indistinct and recommendatory reports, when the transaction itself is so clearly susceptible to positive proof.

The Bedford case establishes that the United States, in the exercise of its plenary power and authority over the navigable streams of the country in aid of commerce and navigation, can by public works resting only against the banks of the channel prevent the same from erosion and preserve its natural identity; that consequences, however injurious, resulting from such procedure are but natural results, consequential in character, and damnum absque injuria. The improvement of the Mississippi River through the instrumentality of a congressional commission manifestly purposed not only the reclamation of the extensive flood waters of the stream, but the erection of such permanent structures along its banks as would prevent the same from erosion and successfully resist the increased velocity of the current and the increased flood heights of the river. The Gov-

ernment was not concerned in the reclamation of riparian lands and was without authority to expend money for the purpose. (Act Mar. 3, 1881; 21 Stat., 468-474.) It was alone concerned in an endeavor to establish settled conditions, throw the escaping flood waters back into their natural channel, and keep them there. It undertook to preserve the channel of the river, the channel the river itself had made in its meanderings from its source to its mouth.

The claimants' lands, unfortunately situated as were the lands of Bedford, suffered from this improvement in that they were more frequently overflowed than theretofore, and the resultant deposits were more extensive.

The findings show, and it is conceded, that said lands are not and never have been permanently submerged; that in the years 1894-1896, 1900-1902, 1905, and 1910 they were not overflowed at all; that despite partial overflows from 1896 to 1908 the claimants have harvested and sold $328,003.98 worth of cotton therefrom; that as late as the season of 1909 claimant E. H. Jackson had 500 acres in cultivation, and claimant Mattie W. Jackson in 1910 was enabled to realize profit from her plantations which were not overflowed. Aside from the question of permanent submerging, even if same
43 prevailed, the claimants under the authorities cited could not recover. The United States was clearly within the scope of its authority in preserving the banks of the river; and if thereby the perpetual continuance of the great basins of drainage made by the overflow waters of the river which had served as natural outlets for the same were destroyed, it was but the incidental result of the prosecution of the work, and the United States is not to be held liable in damages for pursuing its general plan of improvements alongside the established channel of the river whereby it prevents the water which should be in the channel from escaping elsewhere.

This case is not like the case of Barden v. City of Portage (79 Wis., 126); no artificial structures were placed on or near the claimants' lands; no waters were deflected toward the same; the public works complained of simply destroyed their existing means of drainage made by the uncertain flow and course of an exceedingly crooked and unreliable water course. Prior to 1859 claimants had no outlet through the Bougere Crevasse. There was no absolute certainty that it would continue to be a means of drainage for the lands, for an unusual flood height, a sudden change in the elevations of the basins, or the making of a new channel by the river itself might have destroyed its usefulness and thereby subjected claimants to injuries as extensive as here claimed for. The United States closed the crevassee by the construction of levees on the banks of the river and the flood waters theretofore escaping through this channel were retarded and remained longer on the claimants' lands, just as in the Bedford case the United States held intact the new-made channel of the river and thereby submerged 2,300 acres of the plaintiff's lands which would have remained high and dry if the water had continued in its old channel. The fact that claimants' lands were not so frequently subject to overflow under the natural conditions that existed prior to the construction of the levees does not obligate the

Government, in the lawful prosecution of public works in aid of navigation and commerce, to avoid a disturbance of those natural conditions or otherwise incur extensive liabilities.

The facts in the case of Archer v. United States, No. 30471, decided December 4, 1911, are so entirely different from the facts in this case the decision of the court in that case can not apply here. In the Archer case the findings show that the officers of the United States, to protect the channel of the Mississippi River, actually invaded and took possession of more than 31 acres of the lands of Archer and constructed thereon a spur dike, made out of his own soil, some 66 feet in length. The result was to deflect the current of the river over and across the lands of the claimant, in consequence of which they were rendered valueless. The Archer case is similar in most respects to Pumpelly v. Green Bay Co., supra, and Lynah v. United States, supra.

The great basins of the Mississippi reclaimed the lands of riparian owners on the opposite sides of the river from where they were formed and forced those within their limits to erect levees and embankments or abandon their farms for cultivation. The public works of the United States in the aid of navigation incidentally closed these immense outlets, not in this case by a physical invasion of claimants' property, not by appropriating any portion of
44 their soil for levees, nor by proceedings in eminent domain, but by a system of levees built and adopted where previously built on the banks of the river to prevent the water from getting out of the channel and becoming so low as to impede and retard navigation. The bed of the stream was not disturbed; no dams or cross-tide dams, jetties, or other improvements retarded the flow of the water and backed it up and upon claimants' lands. The United States simply took the banks of the river as they found them and sought to preserve them in statu quo. The condition now is what it would have been had the overflows been restrained long years ago. The character of the work done was not essentially different from dredging; without doubt the governmental authorities had full power and authority to deepen the channel by dredging, and if they adopted a different means better suited and perhaps more inexpensive, which in effect accomplished the same purpose, the results are the same. Surely it could not be said from the adjudicated cases that the United States is disabled from increasing and preserving from erosion the banks of a navigable stream and thus forestalling by an important improvement the continuance of a condition which if allowed to continue would eventually destroy the usefulness of the river as a commercial highway without incurring, as was said by the court in the Bedford case, "immeasurable responsibility." Claimants' lands from their natural state were burdened with the servitude of a dominent right in the Government of the United States to improve the river in aid of navigation and commerce.

The Mississippi River Commission, in its annual report for 1894 at page 2713, reviews at length the subject of injuries to private lands situated in the alluvial basins of the river. The whole tenor

of their observations indicate an apparent indecisiveness as to the extent of responsibility attaching to the United States and the State and local authorities. In speaking of the erection of private levees by the owners of riparian lands in this particular locality, whereby the same could be reclaimed and protected, the commission uses this language:

"It must be recognized that the result will be to inflict some and perhaps great hardships upon the owners of lands in the unprotected areas described. Just how great the increase of burden cast upon those lands from this cause will be can not now be foreseen. They have always been liable to overflow by the highest floods, and they have always escaped overflow in some years. It is probable that this will continue to be true in the future as in the past. There may be, however, some floods which, unconfined, would not overflow them, but which, confined, will overflow them, and the injury in such case would doubtless be of that immediate and proximate character which constitutes recognized ground of legal redress.

"But the subject is one with which the commission does not feel authorized to deal. In making recommendations for the expenditures of money in the construction of levees it has felt bound to make such application of it as would probably secure the largest aggregate of beneficial results. Some of the minor areas mentioned are large and valuable enough to warrant the expenditure of the money necessary to protect them by levees, while others are not. As to the former, the work is at present simply deferred to await the completion of other work which is considered more important. As to the latter, the construction of levees by the United States would seem to be an expenditure of money merely or mainly for the purpose of repairing a private wrong. This the commission regards as beyond its jurisdiction."

From the report it would seem that it is not impossible for claimants to protect their lands from overflow by private levees and embankments, and Finding XXXIX shows that it had been done. If so, the duty is cast upon them and the damages claimed thereby materially minimized, if not fully prevented. (Manigault v. Springs, 199 U. S., 473-483.)

It is difficult to see from the record in this case wherein the improvements constructed by the United States on the banks of the Mississippi have resulted in such an invasion of claimants' lands as to amount to a practical ouster of possession. True, they are not in all respects as they were previous to the improvements, and doubtless their cultivation and value have been impaired. No doubt when they were purchased by the present owners a change in the situation as it then existed was not contemplated, but the ownership of riparian lands on navigable waters is always subject to the consequences of governmental improvement of the stream in aid of navigation. (Gibson v. United States, 166 U. S., 269.)

An argument sustained only by a contrasting of facts in this case with those found in the Bedford case is more than minimized by the fundamental rule of law established by the Supreme Court in the Bedford case. The Bedford case sustains the contention that the

power of the United States in making public improvements in aid of navigation and commerce is not limited to a maintenance of natural conditions. If it was, improvements would be valueless and vast appropriations wasted. In this case the Bougere Crevasse, which is in fact the crux of the whole situation, is, as its name implies, a breach in the banks of the river made by the flow of the stream itself. If the Government is powerless under the law to close this breach either by revetment or levee and maintain the integrity of the river banks, then it is difficult to see how efficient public works could possibly accomplish their designed purposes. The Government has the undoubted right to maintain the stream in its natural condition—i. e., as it would naturally be if these extensive crevasses had never occurred. However advantageous natural crevasses may be for drainage purposes to riparian owners, nevertheless they may be closed by the United States in improving the navigation of a stream in aid of commerce, and if nothing more is done the resulting damages are consequential.

The rulings of the Supreme Court in the Bedford case alone preclude a judgment for the claimants, and the petition is dismissed. It is so ordered.

46 MATTIE W. JACKSON, Widow; WILLIAM GRAHAM JACKSON AND GLADYS L. JACKSON, Infants; AND ERNEST H. JACKSON

v.

THE UNITED STATES.

HOWRY, *Judge*, dissenting:

The cause of action arises out of the authorized acts of certain officers and agents of the defendants in so improving the channel of the Mississippi River as to take the certain lands described in the petition of the plaintiffs for public purposes and use. The importance of a right determination of the issues can not well be overestimated.

In so far as plaintiffs are concerned, a result adverse to the right to recover can neither be depreciated nor underrated, because when it shall be determined, if at all, that their land has not been appropriated for public use, and consequently has not been taken within the meaning of the fifth amendment to the Constitution, then these plaintiffs will be effectually deprived of rights of property so valuable to them as to have accomplished their ruin.

The private right involved, important as the result must be to that right, can not be compared, however, to those larger questions disclosed on the face of the record as to whether the acts of the Government affecting these lands and other lands similarly situated amount to a taking of property for which compensation should be made or whether these acts resolve themselves into a question of consequential injury only for which damages can not lawfully be awarded.

The findings establish that the lands for whose taking compensation is asked are located within the limits of a narrow strip of

country in the Homochitto Basin, on the left bank of the river, 40 miles below Natchez, Miss., and 25 miles above the mouth of Red River, and between the Mississippi River and the highlands east of it between Vicksburg and Baton Rouge. This basin has an average width of 2 miles. The bluff behind the lands is known as the foothills and is being used as the only obstruction to flood waters, and serves the purpose of levees, leaving the flood invasion the lands fronting the river in the basin. The reason of the Government for refusing to build levees on the basin banks of the river grew out of the fact that the cost of building levees within that basin
47 was greater than the value of the lands which such levees would protect. The frontage of the lands along the river in that basin is so short that the back water of floods entering through the opening left at the lower end for local drainage of the basin will reach to the inner foot of the levee and submerge nearly, if not all, of the inclosed land. The complete reclamation of the lands in this basin is only practicable by treating them as polders and establishing an artificial drainage by pumps and flood gates. The surveys of the Government confirm and prove that the cost of the levees "in most cases" would exceed the value of the land. The foothills back of this basin were near enough to serve the purposes of a levee line in times of high water. For these reasons the Government did not construct any levees in that district known as the basin.

The Mississippi River Commission suggested three ways of dealing with the problem of protecting these lands or compelling the owners to abandon them, to wit: (1) To aid the owners of the inundated lands in building levees; (2) To compensate the owners in damages for their injuries; and (3) To buy the lands and devote them to forestry.

The lands in suit have been subject to overflow since 1828 from the river. In periods of overflow a deposit of silt and sand has been precipitated during seasons of high water, but the water quickly passed off. The private levee on the Jackson lands saved the property from overflow in 1899 and 1904. The overflow of the lands caused by the progress of the Government work brought heavier deposits to the land and the effect of the frequent and successive overflows beginning in the year 1906 and extending through 1909 was to drive away the tenants, cover 1,700 acres with sand and silt deposits from 6 inches to 6 feet in depth; to cause the land to grow up with weeds, young willows, and cottonwood from 6 to 15 feet in height; and to lift from their foundations and wash into the fields many of the buildings, houses, and cabins formerly on the lands, and to carry away the flooring from these houses and fencing on the land through the action of the swift currents of the water so that the lands have been destroyed for agricultural purposes and have no market value.

The work of levee improvement continued to June 30, 1910. The Mississippi River Commission up to that time had allotted to levees nearly $28,000,000. The commission had closed what is known as the Bougere crevasse, opposite the lands named in this case. That

crevasse had remained open from 1859 until 1902 or 1903, since when it has been practically closed to a point near the mouth of Red River by the improvements on that side of the river, the effect of which has been to throw the water back onto the lands described by the petition in this case. The levee closing the crevasse was 29 miles in length and 23 feet in height, furnishing a continuous line of levee opposite the Jackson lands. The effect of the closure in times of flood is to produce an increase flood stage of about 4 feet of water on the Jackson lands in addition to the increased elevation of 6 feet in the flood height. The levee opposite the lands here named was constructed by authority alone of the United States.

By closing the natural outlets along the river the overflows from the waters of the Mississippi occurred at such frequent intervals and remained for such a long duration of time, the land has become useless because of the heavy deposits of sand.

48 Before the Government undertook improvements on the west bank of the Mississippi River opposite the land of these plaintiffs, levees sufficiently high and strong to hold the flood waters in the channel of the river had never been built. Consequently, in periods of overflow the water remained for a short time only on the Jackson land, escaping through "the natural outlets and crevasses into the basins and from said basins into the Gulf of Mexico." The outlets and drains provided by nature were such as to accommodate the flood waters and the lands of these plaintiffs were not overflowed as frequently before the outlets were closed by the levee construction of the United States "and consequently were but little injured by the overflows."

But the effect of the adoption of the foothill levee line was to keep the lands between the new levee line and the river submerged too long to enable the owners to cultivate the land.

The plan of the United States was to increase the velocity and scouring power of the water and to deepen the channel of the Mississippi River for two purposes: (1) To improve the river for navigation, and (2) reclaim and to protect the land on the west from overflow in times of high water.

Thus to reclaim and protect the land on the west bank of the Mississippi the Government has dispossessed plaintiffs from their lands on the east bank.

The issues are strictly issues of law and can not properly be determined without keeping closely in view the findings and their effect upon the rights of the parties.

The findings import verity. They must be accepted as true in obedience to the rule of the Supreme Court, from which there can be no departure without abrogating the rule itself. The appellate court will refuse to look elsewhere for the facts except as they appear in the findings and official reports of which judicial notice will be taken and not in the opinion of my brethren of the majority.

The majority here is of opinion that the Mississippi River Commission has not adopted as the main channel of the river from Vicksburg to Baton Rouge the lands between the levees on the west and the highlands on the east, because of "an utter absence of any

such express intent found in the numerous reports of the commission"; and it is suggested in the principal opinion that the adoption of the line suggested should be proven "from living witnesses" because "the intentional taking of a vast acreage of land is a transaction too solemn to depend for adjudication upon indistinct and recommendatory reports when the transaction itself is so clearly susceptible to positive proof."

The "intent" is not in issue, and what the Mississippi River Commission "intended" is not material. What the commission did and the effect of what it did is material. If the intention of an official body be material enough to be made an issue living witnesses could not be heard to prove the intention except by stating what others did, not what they thought.

The material thing, then, to be considered is what the findings show on this point, though it does not seem to me to be very material to state anything about it in view of the fact that it appears from the comments of the majority of the court that the Mississippi River

49 Commission did officially report as the main channel of the river the lands between the levees on the west and the highlands on the east. If this is not the "adoption" of a plan it is nothing. It was the adoption of plan enough to destroy the lands of these plaintiffs.

As the findings are agreed to by the plaintiffs and the Attorney General, the matter of the "adoption" of the foothills as the permanent levee line of the river is the only subject matter of difference between the parties on the facts. The "adoption" being something in the nature of a conclusion, the specific findings must settle any differences on this matter if it be of any importance.

Finding XI shows that the extension of the general levee system since the United States adopted its use and assumed "permanent control" of the levees has resulted in an increased elevation of general flood levels, thereby subjecting plaintiffs' land to deeper overflow than they were subjected to formerly or would be subjected to now if the levee system was not in existence and consequently has destroyed the value of the lands for agricultural purposes caused by the abandonment since 1908. Taking the findings altogether and with knowledge of the fact that the old and broken pieces of levees were taken by the Government and connected together and new levees built and the new and the old works were strengthened and that the works are now in that condition, it may fairly be stated that the line suggested and in actual use has been adopted by the Government.

The case does not involve any question of immeasurable responsibility either in law or in fact, because: (1) The Government of the United States does not undertake public work beyond its resources. (2) There is nothing in proof to indicate or to justify the court in inferring that the pecuniary responsibility of the Government is without its present ability to pay. (3) Immeasurable responsibility arises for remote and consequential damage and where the consequences of improving navigation in the interest of commerce between the States are of such overwhelming character as restrains the

Government from undertaking public work so momentous as to make impossible the exercise of the right to improve. That is not this case. The matter before the court is unlike any class of cases (or, for that matter, unlike any one case) where it appeared that the object of the work was merely to preserve the conditions created by natural causes. (4) Though the property is no longer valuable to the owners because it can not be used for agricultural or grazing purposes, nevertheless the lands are capable of growing many kinds of valuable timber and can be made to produce material for revetments and other work necessary to improve the natural channel of the river.

While the market value of the lands has been destroyed and they are no longer useful to the owners or to anyone at the present time, they have yet a prospective and speculative value in that the future may prove the property of considerable value to the United States. This prospective value, it is true, is in the indefinite future and necessarily depends upon the growth of timber. When the conditions as to value are met as the consequence of the timber growth the Government as the rightful owner will have to its credit something for what it ought now to pay. But if it be speculation merely as to whether in time the lands will become valuable the reason is not diminished for extending compensation for a taking that may be everlasting, and for which taking the present owners are without remedy except as provided by law.

50 As a matter of common knowledge, appearing from the public records and from the files of this court and estimates probably appearing in the official reports of the Mississippi River Commission, there are plantations destroyed by the character of the improvements of the Government exceeding but little over 100 farms and the whole body of land thus taken being not worth probably over $7,000,000. From the sources of the great river to its mouth similar conditions do not exist (and probably never will exist) elsewhere.

Federal power over commerce among the several States is broad enough to enable the legislature to carry out one of the great objects of our Union. This was long ago settled in Gibbons v. Ogden, 6 Wheat., 204, and was accompanied with the statement that this power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."

But the Supreme Court never meant to say, nor did it imply, that the power to improve may be exercised to such an extent that public work may be undertaken and carried on without compensation to the citizen owner where his property has been taken for the benefit of the public. The exercise of the power to the "utmost extent" is accompanied by, and goes hand in hand with, the fifth amendment, which prescribes limitations on the power to improve navigation unless means enough are used to pay such owner when public exigencies dispossess him of his property.

When it shall be held by courts that the Government can constitutionally spend millions in carrying water to lands otherwise

arid. and when it shall further be held that the appropriation of the lands of one person may be made by the United States in the name of and for the improvement of a river and which incidentally includes protection to the lands of a person on one side of that river without compensation which can not be provided for a landowner on the other side who becomes ousted and merely because of the dread of large responsibility it will be time enough to say, in the language of an illustrious Englishman, that when courts can be influenced by considerations of mere cost regardless of the protection provided by the organic law for those in the enjoyment of private property, such country is hastening to decay.

Congress adopted the Eads plan, which provided for a continuous line of levee construction from Cairo to the Gulf. Permanent control of the low, insufficient, and disconnected levees which had been begun by local authorities, and in some cases constructed by private land owners, was assumed by the Federal authority. Our tenth finding shows that the general improvement attempted to confine the waters in a narrower channel as the result of the increased elevation of the works on the banks of the big stream. This increased elevation produced more frequent and destructive overflows at all points where the levees were not strong enough to resist the force of the water.

Our twelfth finding shows the active closing of crevasses from year to year; and our thirteenth finding, taken in conjunction with the ninth, shows that before the joinder of the levee line by the United States (pursuant to the Eads plan) and which made the higher banks as they were constructed continuous, there were occasional overflows of plaintiffs' lands, but not enough to pre-
51 vent cultivation. The occasional deluges did not materially damage the lands for grazing and agricultural purposes nor affect their market value. On the contrary, the water (before the final public improvements) which flowed from above—not so much from love of motion as from want of rest—did not remain long enough to submerge the lands so as to prevent the planting of crops. The silt deposits enriched those lands where the water had quick opportunity to escape to a lower level. After the completion of the levee system by the construction of the higher embankments and the general confinement of the flood discharges within a narrower chanel the floods were so frequent as to make the unprotected land continue in a submerged condition too long to make the injury immaterial. These frequent and deeper overflows for a longer period of time had the effect of dispossessing the owners. If this condition did not constitute an actual invasion it is difficult to find a definition of what such conditions did create.

Official reports (Miss. Riv. Com. Rep., 1910, p. 2938) show "perpetual inundation"; want of redress for the sake of improvements to lands behind the levees on the opposite side of the river. The closing of the Bougere crevasse immediately opposite plaintiffs' lands finished the work of destruction and accomplished their ruin.

The majority of the court do not say, but assume from some report that "it would seem," that it was not impossible for plaintiffs to have protected their lands from overflow by private levees

and embankments, and if so the duty was cast upon them so to do, and if done the damages claimed would be materially minimized, if not fully prevented, citing Manigault v. Springs, 199 U. S., 473.

The sixth finding of the court (adverted to in the principal opinion) does not sustain the assumption. Overflows were in part averted by the private levee of plaintiffs at times. But the findings also show that when the crevasses opposite plaintiffs' lands were closed and the work of public improvement was continued to the extent of piling up more earth on the opposite side of the river in the construction of levees and to such an extent as to raise the level of the water in the river as much as 6 feet, private levees were washed away as the result of the public improvements. The owners could no more protect themselves without the sacrifice of the lands to the full extent of their value than could the United States. We have the official report disclosing that it was cheaper to the United States for the owners to abandon the lands and be compensated by the Government than for the United States to build levees. Especially is this report to be taken as true when, as the result of Government work, the findings show that the private levees had been washed away. If it was more profitable for the Government to pay for these lands than to build levees to protect them it necessarily follows that their market value was totally destroyed by the improvements.

Private levees could not have been reconstructed to prevent the floods by plaintiffs in the case before the court for the obvious reason that such levees as plaintiffs had ever put on the property were next to the river on lands owned solely by the plaintiffs. They were without power to build levees above their own lands for want of ownership.

52 The case of Manigault v. Springs, supra, merely decides that when an owner is put to additional expense in warding off the consequences of an overflow there can be no recovery; but where there is a practical destruction, or material impairment of value of lands by overflowing them as the result of the construction of dams, there is a taking which demands compensation. No amount of expenditure would have availed these plaintiffs to have saved their lands.

The question resolves itself into the difference between consequential damages and a taking of private property for public purposes. Only three cases are cited in the majority opinion which seem to have any bearing upon this one issue in the case.

In Transportation Co. v. Chicago, 99 U. S., 635, there appeared to be an impairment of the use where the acts done did not directly encroach upon property of a private nature. But Findings VI, XI, and XVIII in the present case establish encroachment upon the lands of such character as to destroy. The superinduced additions of water, sand, and silt proved to be permanent deposits to the extent of burying the lands in mud and annihilating value as to compel abandonment of the property.

In Gibson v. United States, 166 U. S., 269, it appeared that

there was no taking, no destruction, and no consequence except damage arising out of alleged inability to use a landing for the shipment of products from, and supplies to, a farm for the greater part of the gardening season. There was no water thrown back on the land. The Government neither attempted nor assumed to take private property. Subsequently, in United States v. Welch, 217 U. S., 333, an award was sustained for destruction of a right of way and also for damages to property destroyed for public purposes. Such "destruction for public purposes may as well be a taking as would be an appropriation for the same end," so the court said.

In Bedford v. United States, 192 U. S., 217, damages were claimed as the result of "revetments to prevent erosion of the banks from natural causes." But revetments did not change the natural course of the river. Said the learned judge, who delivered the opinion of the Supreme Court in the Bedford case, "There was no other interference with natural causes." The damage to the land, if any damages could have been assigned to the works at all, was but "incidental consequences" of something which the Government had the right to do.

If on the side of the revetments and above on the banks a levee had been erected there would have been obstruction of the flow of the water. The revetments shown to have been constructed in the case of Bedford were placed below high-water mark. The purpose of revetment is to prevent erosion by the waters to high-water mark but not above. The purpose of a levee is to obstruct the flow of water, which in many cases either increases or causes erosion. The purpose in the present case in the construction of a levee was (and its effect was) to obstruct the flow of water when it should get above the high-water mark and not below that mark. Revetment work is entirely submerged when there is enough water in a river to reach a levee placed on top of the bank. The objects of revetment work and a levee are entirely different and serve distinct purposes.

53 The seventh finding in the case of Bedford discloses that "the revetment did not change the course of the river as it then existed, but operated to keep the course of the river, at that point, as it then was, * * * and the injury done to the claimant's land was the effect of natural causes." In the case at bar natural causes had never occasioned injury to plaintiffs' lands and injuries would never have been occasioned but for an interference with natural conditions.

From 1828 to the time when the Government by its works threw upon plaintiffs' lands volumes of water and destroyed the attribute of ownership plaintiffs were able to cultivate their lands. Since then periodical overflows have been precipitated so as to deprive them of the use. The findings establish the permanent character of the taking and bring the present case within that of Pumpelly v. Green Bay Co., 13 Wall., 166, and that of United States v. Lynah, 188 U. S., 459. In the latter case the works were constructed in the bed of the river and obstructed the natural flow of its water,

and as a direct consequence caused the overflow of Lynah's plantation. That is precisely the condition in the case now before the court, except that instead of the works being placed in the bed of the river they were placed on the banks of the river, and the consequence of the one is as direct in the case at bar as the consequence was in Lynah's case. The case of Williams v. United States, 188 ib., 485, following Lynah's case, shows a similar taking. The just compensation provided by the Constitution for such taking and guaranteed obviously "requires that the recompense to the owner for the loss caused to him by the taking of a part of a parcel or single tract of land shall be measured by the loss." Grizzard v. United States, 219 U. S., 180.

There are limitations upon the power not only of the rights of the Government where it is a proprietor, but likewise limitations upon its powers as a sovereign. Such limitations as to either the proprietary right or the authority of government as a sovereign operate to prevent the exercise of either right so as to destroy the essential uses of private property. Said the Supreme Court, "To take away the essence and value of property without compensation is practically to take property and this is beyond the power even of sovereignty except by proper proceedings to that end." (Curtin v. Benson, 222 U. S., 78.)

It will be observed that in the present case there was no necessity for the river to be scoured. (That, however, makes no difference even if that necessity existed.)

The Mississippi River Commission made the foothills serve the purpose of a levee line compelling the water to return to the channel in times of high water. They state that in their report. And this statement is accompanied with another having, as I see it, a great bearing in the settlement of the issues. The commission said that the construction of levees was not important for the improvement of the river for navigation. We know that the channel of the river was not improved for purposes of navigation, because vessels of the greatest draft could float upon the bosom of the flood tides. It nowhere appears that the river was not deep enough at any time to be navigated after the subsidence of the flood waters.

It is evident that the levees were raised in excess of 20 feet
54 to protect the lands on the west side of the river from overflow. The consequences of the general confinement of the flood discharged by the levee "as a whole" had the effect of driving plaintiffs away.

Another fact must not be overlooked. Before the crevasse, known as the Bougere Crevasse, occurred, as far back as 1859, the bank did not obstruct the high-water flow. This bank did not extend from 3 to 5 feet above the highest known water as do the levees completed by the United States. Formerly, in times of flood, water went over the bank, and it was the overflow of the river's bank which caused the crevasse. The record discloses that until 1890 there were only two serious overflows, one in 1882 and another in 1884. But even in those years the water went off in time to make a crop.

Many of the cases relating to the rights of riparian owners do not involve the question of obstruction of the natural flow of flood waters. But there are many cases highly persuasive which do deal with the question now before the court. In the early case of Rex v. Trafford, 20 Eng. C. L. R., 498, Lord Chief Justice Tenterden said that, "It has long been established that the ordinary course of water can not be lawfully changed or obstructed for the benefit of one class of persons to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders can not be justified. No case has been found that will support such a distinction." Though Trafford v. Rex was reversed because the facts in the case did not warrant a special verdict, the reversing court agreed in the principle laid down by the Court of King's Bench, 21 Eng. C. L. R., 272.

There are very many cases which show the right to have a stream flow as it is wont by nature, which includes the right to have the water flow off from one's premises as it is accustomed to do, and this right "is property."

There are also very many cases which show that where works are constructed below the land of a proprietor, such as a bridge, or culvert, or dam, or alteration of the channel, which cause the water to set back and overflow the land of such proprietor, there is a violation of such right and, if the works are authorized by law, there is a taking for which compensation must be made. The books are full of cases to this effect and may be found summarized in 1 Lewis' Eminent Domain, sec. 80, p. 90, 3d ed. What possible difference can there be between cases like these and cases where works are constructed on one side of a river to the destruction of an owner's land on the other side of the stream?

The doctrine of damnum absque injuria can have no application here, because that principle is only applicable for "those unexpected visitations whose comings are not foreshadowed by the usual course of nature and must be laid to the account of Providence, whose dealings, though they may afflict, wrong no one." Pittsburgh R. R. Co. v. Gilleland, 56 Pa. St., 452; O'Connell v. East Tenn. Ry. Co., 87 Georgia, 261.

Barney, J., concurs in the dissenting opinion.

55 *X. Judgment of the Court.*

No. 18274.

MATTIE W. JACKSON, Widow; WILLIAM GRAHAM JACKSON and GLADYS L. JACKSON, Infants; and ERNEST H. JACKSON

vs.

THE UNITED STATES.

At a Court of Claims held in the City of Washington on the 17th. day of June, 1912, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of the claimants, Mattie W. Jackson, widow; William Graham Jackson and Gladys L. Jackson, infants; and Ernest H. Jackson, be, and the same is hereby dismissed.

BY THE COURT.

56 *XI. Application for, and Allowance of, Appeal.*

From the judgment rendered in the above-entitled cause on the 17th day of June, 1912, the claimants, by Waitman H. Conaway, their attorney of record, on the 17th day of June, 1912, make application for, and give notice of, an appeal to the Supreme Court of the United States.

WAITMAN H. CONAWAY,
*Attorney for Claimants.*

Filed June 17, 1912.

Ordered: That the above appeal be allowed as prayed for, June 17, 1912.

BY THE COURT.

57 Court of Claims.

No. 18274.

MATTIE W. JACKSON, Widow; WILLIAM GRAHAM JACKSON and GLADYS L. JACKSON, Infants; and ERNEST H. JACKSON
vs.
THE UNITED STATES.

I, Archibald Hopkins, Chief Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the Court; of the opinion of the Court; of the dissenting opinions by Howry and Barney, JJ.; of the final judgment of the Court; of the application of the claimants for, and the allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 13th day of July, A. D., 1912.

[Seal of Court of Claims.]

ARCHIBALD HOPKINS,
*Chief Clerk Court of Claims.*

Endorsed on cover: File No. 23,295. Court of Claims. Term No. 720. Mattie W. Jackson, widow; William Graham Jackson and Gladys L. Jackson, infants, by Mattie W. Jackson, their next friend, and Ernest H. Jackson, Appellants, vs. The United States. Filed July 15th, 1912. File No. 23,295.

THE

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1912.**

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**No. 720.**

MATTIE W. JACKSON, WIDOW; WILLIAM GRAHAM JACKSON, AND GLADYS L. JACKSON, INFANTS, BY MATTIE W. JACKSON, THEIR NEXT FRIEND, AND ERNEST H. JACKSON, APPELLANTS,

*vs.*

THE UNITED STATES.

---

**No. 718.**

MARY E. HUGHES, APPELLANT,

*vs.*

THE UNITED STATES.

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**No. 719.**

THE UNITED STATES, APPELLANT,

*vs.*

MARY E. HUGHES.

---

APPEALS FROM THE COURT OF CLAIMS.

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**MOTION TO ADVANCE.**

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WAITMAN H. CONAWAY,
*Attorney for Appellants in Cases Nos.* 718 *and* 720, *and Attorney for Appellee in Case No.* 719.

OCTOBER 21, 1912.

THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

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**No. 720.**

MATTIE W. JACKSON, WIDOW; WILLIAM GRAHAM JACKSON, AND GLADYS L. JACKSON, INFANTS, BY MATTIE W. JACKSON, THEIR NEXT FRIEND, AND ERNEST H. JACKSON, APPELLANTS,

*vs.*

THE UNITED STATES.

---

**No. 718.**

MARY E. HUGHES, APPELLANT,

*vs.*

THE UNITED STATES.

---

**No. 719.**

THE UNITED STATES, APPELLANT,

*vs.*

MARY E. HUGHES.

---

APPEALS FROM THE COURT OF CLAIMS.

---

## Motion to Advance.

Comes now Waitman H. Conaway, attorney in behalf of the appellant in cases Nos. 718 and 720 and in behalf of the appellee in case No. 719, and moves the court to advance

the above-entitled three cases (*to be heard together*) and respectfully suggests that the same be set for hearing on a day convenient to the court in November or December, 1912, and for reason therefor states:

These are suits instituted against the United States, in the Court of Claims, involving the question of a "taking" of private property for public use, without payment of just compensation, within the meaning of the fifth amendment to the Federal Constitution, *and have been pending in that court since February*, 1894.

The Jackson lands, in controversy in Case No. 720, are situated at Jackson Point, in the Homochitto Basin, on the left bank of the river, forty miles below Natchez and twenty-five miles above the mouth of Red River, and are located in that narrow strip of land lying between the Mississippi River and the highlands east of it between Vicksburg and Baton Rouge.

The Hughes land, involved in Case No. 718, is located in the Homochitto Basin, in the same strip of territory, a short distance below Vicksburg, and similarly affected.

In 1895 and 1896 the Mississippi River Commission, after having before it a copy of the petition filed in the Jackson case (720), caused a completed survey to be made of said district by Col. Derby, the Engineer Officer in charge. The report of Col. Derby will be found at page 3472 of the Commission's report for 1896 (Finding 5, R., p. 23). On page 3473 of same report it is shown that the Jackson lands are located in that small basin between Ellis Cliff and Fort Adams, and that the cost of building levees to protect the overflowed lands within that basin was at that time approximately $413,000, while the value of the land to be protected by levee construction in that basin was at that time about $206,500. The report of Col. Derby is accompanied by complete maps and surveys of the land within that basin and will be found in Appendix 13 of the 1896 report of the Commission (R., p. 23, Finding 5).

The location of the Jackson lands and levees required for their protection are shown on Plate 4 accompanying Col. Derby's report.

After having before it the surveys, maps and report of Col. Derby as to the Homochitto Levee District, the Commission in its 1896 report, page 3418 (R., p. 23, Finding 5), says:

> "This district comprises several small and detached basins on the left bank, from Vicksburg to Baton Rouge, in which no levees have ever yet been built, except by private owners. Consideration was given in the last two reports of the Commission to the question arising from the demands of the owners for damages to these lands. * * *
>
> "*Since the date of the last report complete surveys of the several minor basins comprising this levee district have been made.* The general conclusion from these is that the frontage of these districts along the river is so short that the back water of floods, entering through the opening left at the lower end for local drainage of the basin, and that coming from the hills, will reach to the inner foot of the levee and submerge nearly, if not all, of the inclosed land.
>
> "Complete reclamation of these lands is, therefore, only practicable by treating them as polders and establishing an artificial drainage by pumps and floodgates. *The surveys further show that the cost of the levees in most cases far exceeds the value of the land. Their area is so small that it can hardly be contended that their leveeing is important to the improvement of the navigation of the river.*"

Since the year 1896 (a period of over 16 years) the United States has made no effort to construct levees in that district.

In the annual report of said River Commission for 1910, pages 2937-8 (R., p. 23, Finding 5), it says:

> "The attention of Congress has been called in former reports, beginning as far back as 1894, to the situation of the narrow and irregular strip of land lying between the Mississippi River and the highlands

east of it between Vicksburg and Baton Rouge—a distance of 234 miles by the river. Within these boundaries the alluvial lands are cut across by a number of small streams coming in from the hills, so as to form, in connection with the devious course of the river, detached areas difficult of protection by levees. The elevation of the general flood levels, which has resulted from the extension of the levee system in recent years, subjects those lands to deeper overflow than they were subject to formerly, or would be subject to now, if the levee system were not in existence. The people living in the larger of these overflowed areas have been clamoring for aid in the building of levees to protect their lands for sixteen years past. But the Commission has been unable to see its way to the recommendation of allotments for that purpose out of the appropriations, for the four reasons that the construction of levees along these fronts did not appear to have as important value here as elsewhere in improvement of the channel; and the expense of them was out of proportion to the value of the lands to be protected; and the inhabitants were unable to bear the share of the expense which the Commission required as a condition of Government aid elsewhere; and the funds appropriated from year to year were all necessary for other works of larger importance.

"*Some of the land-owners in these areas have brought suits for damages in the Court of Claims, which, though pending for many years, have as yet been unavailing.* While it is not within the province of the Commission to express any opinion as to the legal merits of these suits, it is apparent to any one that there must be great difficulty in the way of adequate relief in that manner. The immediate cause of the injuries complained of is the increased elevations of the flood heights. That is the result of the general confinement of the flood discharge by the levee system as a whole. That system has been constructed in part by the United States, but in larger part by the various levee organizations along the river created by the laws of the States bordering it. The case is manifestly one for legislative rather than judicial treatment. Relief in some form ought in

justice to come from Congress and the State legislature in co-operation. But such co-operation would be so difficult to attain that it is hardly worth the thought. *Meanwhile the litigation drags its slow length along, the lives of the land-owners are passing away, and hope deferred is making their hearts sick. The situation is pathetic and distressing in the highest degree. That these people should be condemned to perpetual inundation without possibility of relief or redress, for the sake of an improvement from which their fellow-citizens are enjoying great benefits, is intolerable to any man's sense of justice.*" (Italics mine.)

"It appears to the Commission that there are three possible ways of dealing with the problem. One is to assist the owners of the inundated lands by helping them to build levees where that method of protection is economically possible. Another is to compensate them in damages for the injuries which they have sustained. A third would be to buy the lands and devote them to forestry. There is more to be said in favor of the last of these suggestions than might appear at first blush. The lands are capable of growing many kinds of valuable timber. They could be made to produce much material for revetment and other works of improvement in the river. If the fields were abandoned to natural growth the land would be gradually built up by deposit and they might become highly valuable for cultivation."

Under acts of Congress creating the Court of Claims, and prescribing its jurisdictional powers, it is given jurisdiction of cases involving a "taking" of private property for public use, under the implied provisions of the Federal Constitution, but not of a case involving the question of "consequential injuries" as the result of Government work.

In all these suits the United States has claimed, and the court below held, in Cases Nos. 718 and 720, that the facts as found by the court below only show a "consequential injury," and not a "taking," dismissing the petition of claimants below, appellants in this court, while in Case No. 719 the court below found and held that there was a "taking"

by the United States, rendering judgment in favor of the claimant, now appellee in this court, the Government having taken a cross-appeal.

These three cases are brought to the Supreme Court on appeal from the Court of Claims, where the only question involved is one of jurisdiction of the court below, and are entitled, on motion, to be advanced as provided by Rule 32 of the Supreme Court.

It is also shown that these cases are class cases and grew out of the improvement of the Mississippi River. There are seventy cases similar to the Jackson case now pending in the Court of Claims, involving approximately 68,000 acres of land at a value of about $2,000,000, as stated in the petitions. The petitions also contain an allegation of a destruction of crops valued at approximately $5,000,000, but this item of crop loss was eliminated by the Court of Claims in sustaining in part the demurrer in the case, leaving only one item—that of land values—in question, the question being whether or not the land in controversy has been taken within the meaning of the Fifth Amendment to the Constitution.

The land in question in these seventy cases is located in that narrow and irregular stretch of territory between Vicksburg, Mississippi, and Baton Rouge, Louisiana, and lies between the Mississippi River and the foot-hills east of it. The Mississippi River has been practically leveed on both sides from Cairo to Vicksburg, on the west side from Vicksburg to the head of the Passes, and on the east side from Baton Rouge to the head of the Passes, leaving unleeved on the Mississippi side a gap between Vicksburg and Baton Rouge, where these lands are located. Bills are now pending in Congress for the relief of the owners of these lands, and the committees considering these bills have given these riparian owners several hearings. An examination of the printed proceedings had before the Committee on Commerce of the Senate last March on these bills shows that the members of that committee desire a final decision by the courts as to whether or not there has been a "taking" of these lands

within the Fifth Amendment to the Constitution before appropriating any money for their relief. It would therefore seem that Congress cannot act wisely on the question of giving the riparian owners relief until your honorable court has decided the questions raised in these cases.

In addition to this, in the language of the Mississippi River Commission in its report for 1910, these land-owners have been "clamoring for relief" for the past sixteen years, and the Commission in its annual reports has for the same period of years been recommending that some settlement be made with the riparian owners.

The legislature of Mississippi in February, 1910, adopted a joint resolution memorializing Congress to give these people relief. (See Laws of Mississippi, 1910, page 309, chapter 363.)

While there are only seventy cases similar to the Jackson case, there are about seventy other cases growing out of the improvement of the Mississippi River, and the decision in the Jackson and Hughes cases will have a bearing, to a more or less extent, on all of these cases. While these three cases are pending in the Supreme Court all of these cases will necessarily have to lie dormant in the Court of Claims in accordance with the policy of the court and the Attorney-General's office that no class cases will be tried until the test case are decided. This is done in the interest of economy, as it would be a waste of time and money to try the class cases in the Court of Claims before the test cases in the Supreme Court are decided.

There are now in the hands of the Court of Claims three cases, Davis (No. 30,188), Gaulden (No. 20,961), and Johnston (No. 18,682), and have been since April, 1911, when the Jackson case was first argued. The delay on the part of the court below in deciding these cases is that the court is waiting a decision of this honorable court in these appeal cases, and that court, if it follows its practice, will not decide them until after your honorable court has decided these appeal cases.

Seventeen of this class of cases have been briefed and prepared for trial on the part of claimants in the court below and have been for about eighteen months. They have not been briefed nor prepared for trial on the part of the Government for the reason that it is the policy of the Department of Justice not to prepare class cases until the leading or principal case has been decided by your honorable court.

This delay, if continued until these appeal cases are reached in their regular order, and with many cases advanced over them, works a great hardship on the riparian land-owners whose lands have, even according to the findings of the court below, been destroyed; and the court below not deciding, and the Government not preparing, any of this class of cases for trial, until these appeal cases are decided by your honorable court, the land-owners are not even entitled to interest on the value of their lands, which have been taken from them, until finally determined by the court, a judgment by the Court of Claims only bearing interest when appealed to this court.

The Hughes case, No. 719, represents comparatively a very small class of cases from the State of Mississippi, there being now in the Court of Claims only four from that State, involving about 3,500 acres of land, valued in the petitions at $200,000, but a far larger number from the State of Louisiana.

It is therefore respectfully urged that these three cases be advanced and assigned for hearing as above suggested.

The Solicitor-General of the United States has [redacted] been furnished a copy of this motion.

WAITMAN H. CONAWAY,
*Attorney for Appellants in Cases Nos.* 718 *and* 720 *and Attorney for Appellee in Case No.* 719.

OCTOBER 21, 1912.

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## (Jackson Case No. 720)



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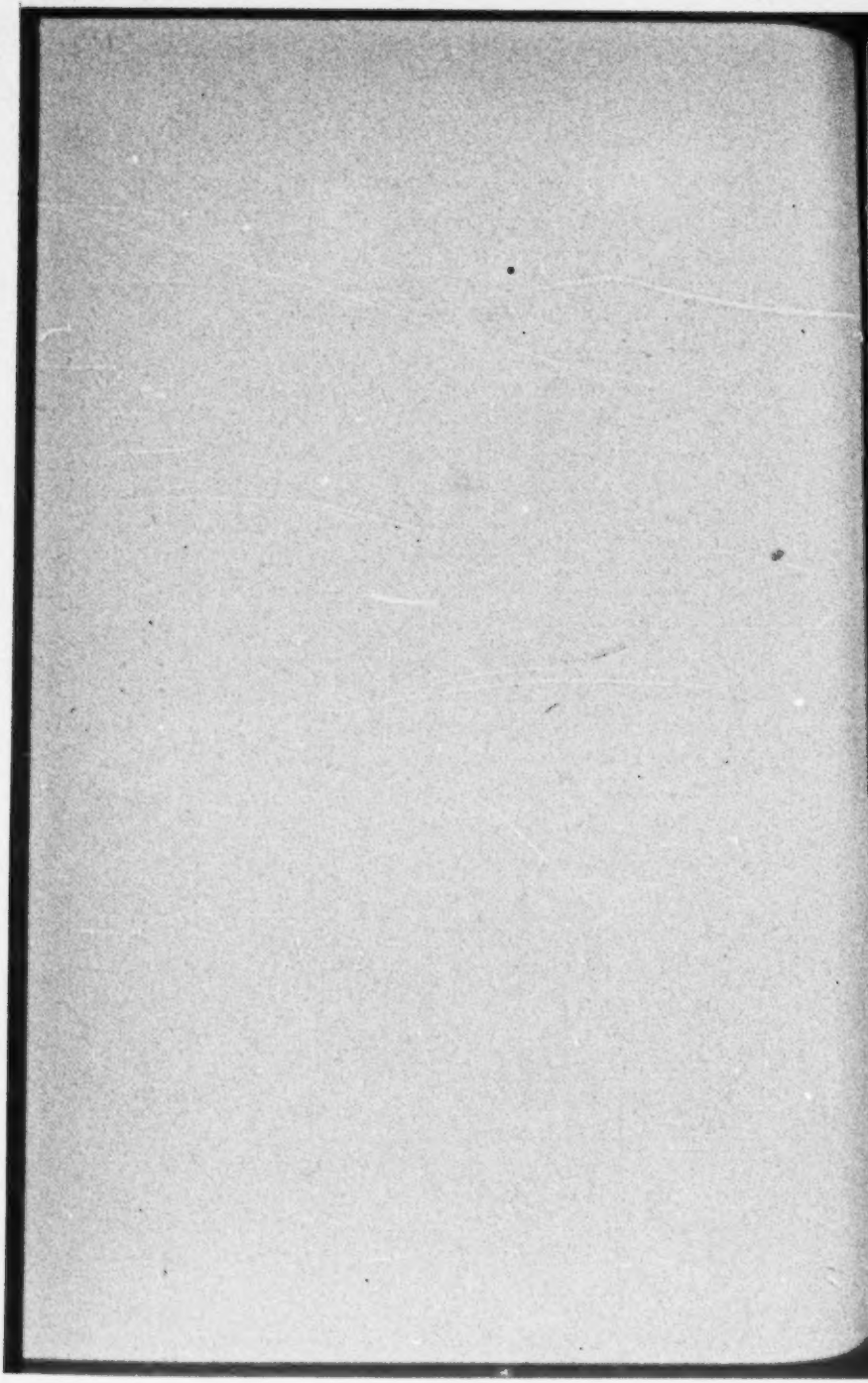

# AUTHORITIES CITED

# SUPREME COURT OF THE UNITED STATES

October Term, 1912.

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MATTIE W. JACKSON, widow; WILLIAM GRAHAM JACKSON, and GLADYS L. JACKSON, infants,

*By*

MATTIE W. JACKSON, their next friend, and ERNEST H. JACKSON, *Appellants*,

*vs.*

THE UNITED STATES.

No. 720.

---

MARY E. HUGHES, *Appellant*,

*vs.*

THE UNITED STATES.

No. 718.

---

THE UNITED STATES, *Appellant*,

*vs.*

MARY E. HUGHES.

No. 719.

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## APPEALS FROM THE COURT OF CLAIMS

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**Brief of Counsel for Appellants in Case No. 720; for Appellant in Case No. 718; and for Appellee in Case No. 719.**

## STATEMENT.

It has been mutually understood between counsel representing appellants and appellees that the above-styled cases should be briefed and heard together, they involving the same findings of fact and principles of law, so closely interwoven as to make them almost inseparable.

## STATEMENT OF JACKSON CASE.

### Description of Alluvial Valley of the Mississippi Prior to Levee Construction.

I.

The alluvial valley of the Mississippi extends from Cape Girardeau, Missouri, on both banks of the river, to the Gulf of Mexico, varying in width from two to forty miles above the mouth of Red River, and to a much greater distance below.

It is topographically divided into six large basins, of which four are on the west bank, namely, St. Francis basin, White River basin, Tansas basin, and Atchafalaya basin, and two on the east bank, namely, Yazoo basin and Pontchartrain basin, as stated in Finding I, page 18, of printed record.

From Cairo, Illinois, to a short distance below Memphis, Tennessee, on the east bank, the hills crowd closely to the river banks, and form small basins, which prevent any large escape of the high water.

On the east bank, from Vicksburg, Mississippi, to Baton Rouge, Louisiana, (locally called Homochitto Levee District), the highlands abut on the river at

Grand Gulf, Rodney, Cole's Creek, Natchez, Ellis Cliff, Fort Adams, Tunica, St. Francisville, Port Hudson and Baton Rouge, still further dividing this stretch of territory into smaller basins from two to six miles in width.

These small basins on the east bank are shallow, and there is no escape of the flood waters which flow into them, except to return to the river at and above the foot of each basin, as stated in Finding I, page 18 of printed record.

Prior to levee construction the flood waters of the Mississippi River, when not contained within the low water banks of the river, found outlets below Cairo into said basins and through the rivers and lowlands draining these basins eventually into the Gulf of Mexico. The natural outlets and drains thus provided by nature were such as to accommodate said flood waters, and the lands of appellants were not overflowed as frequently before the outlets were closed by levee construction as since, and consequently were but little injured by said overflows, and were very valuable plantation property, as shown by Findings VII and IX, pages 25 and 26, of printed record.

Before the United States undertook levee construction all the efforts of the State and local authorities, on the west bank of the river, near to and opposite the land of appellants, had never succeeded in erecting or maintaining levees on that bank sufficiently high and strong to hold the flood waters in the low-water channel of the river, and appellants' lands were flowed for a short time only, the waters escaping therefrom through the natural outlets, drains and crevasses into the basins and lowlands, and from them into the

Gulf of Mexico, as stated in Finding VIII, page 25, of printed record.

Prior to 1883 the States and local authorites had constructed unconnected lines of levees at various points along the said river, on both sides thereof, for the protection and reclamation of lands subject to overflow. The flood waters of 1882 destroyed miles of these levees, as stated in Finding X, page 26, of printed record.

Up to this time the lands of appellants were not materially damaged by overflow, and they still remained valuable for agricultural purposes, as stated in Finding XIII, page 28, of printed record.

## What the United States Has Done, and the Effect of Its Works on Appellants' Land.

II.

By Act of Congress passed June 20, 1879, the Mississippi River Commission was created.

By Act of Congress approved March 20, 1881, the United States adopted a plan, the so-called Eads plan, for the systematic improvement of the Mississippi River for navigation.

Before the creation of the Commission and the adoption of said plan, the levee lines along the Mississippi River, theretofore constructed by State and local authorities, consisted of a broken and disconnected chain of levees of insufficient height and strength to confine the flood waters, which had been locally built without regard to a uniform grade line.

The United States, in carrying out the Eads plan, caused a survey and report to be made by its agents

and officers, showing the condition and location of the old levee lines theretofore constructed by State and local authorities as they then existed. This survey suggested a proposed continuous system of levees from Cairo to the Head of the Passes.

The United States then undertook the projection and completion of a continuous line of levees from Cairo to the Head of the Passes, as suggested by this survey and the Eads plan, and as recommended by the Mississippi River Commission; and, in furtherance of that plan and as part of and supplementary thereto, *adopted to its use, and is now using*, the levees theretofore constructed by State and local authorities after making them much larger and stronger. Since that time levee construction, whether done by the United States or State and local authorities, has been in conformity with the grades and methods of construction recommended and adopted by the Mississippi River Commission, and the efficiency of the present levee system has been largely due to this fact.

The extension of this improved levee system by the United States from Cape Girardeau, Mo., to the Head of the Passes, was authorized by act of Congress in 1906. (34 Stats. L., p. 208.)

The construction of levees by the United States has made the high-water bed of the river narrower and was followed by increased flood heights, which made it necessary to build the levees higher and stronger from time to time. The grades established by the Mississippi River Commission to which levees should be built was from two to five feet higher than the highest known water occurring up until June, 1910, when that grade was changed by the Mississippi River Commission to three to five feet above the high-

est known water, and since then the levees have been raised and constructed in accordance with that grade, as stated in Findings X and XV, pages 26 and 28, of printed record.

The levee lines so constructed have been joined, by the United States, thus giving a continuous line of levee, as contemplated by the Eads plan, with the result that the flood waters of the Mississippi River are confined within and between said levee lines on both sides of the river, or the levee lines on one side and the foothills on the other (the levee lines at Vicksburg and Baton Rouge being joined and connected with the foothills), and encompassed within a narrower scope and channel than heretofore, now recognized as an artificial channel, and attained a higher elevation of approximately six feet in times of high water, has acquired an increased velocity, and the current thereof has become stronger, more forceful and destructive, which subjects the appellants' land to deeper and more forceful and destructive overflows than they were subject to formerly, or would be subject to now, if the levee system were not in existence, and consequently has destroyed its value for agricultural and grazing purposes, causing its abandonment for that purpose since the year 1908.

The immediate cause of the deeper overflow is the increased elevation of flood heights, which is the result of the general confinement of the flood discharge by the levee system as a whole, as stated in Findings X and XI, pages 26 and 27, of printed record.

Before the joining of the levee lines by the United States, in accordance with the Eads plan, thus mak-

ing the same continuous, there were occasional overflows of appellants' land, but they have been made deeper, more frequent and more forceful by the adoption and completion of the levee system by the United States. These overflows, before the adoption of the said system by the United States, did not materially damage said lands, and they still remained valuable for agricultural purposes, as stated in Finding XIII, page 28, of printed record.

While the Bougere Crevasse, opposite the Jackson land, was open, and before it occurred, and the levee system had not reached a state of completion, the appellants, with the aid of their private levees, now destroyed and washed away, and by replanting after overflows, were able to raise profitable crops on their land, as stated in Finding XIV, page, 28, of printed record.

In 1902 and 1903 the United States began to close the Bougere Crevasse. It was completed June 28, 1910, by the United States. This levee is 29 miles in length and 23.4 feet in height, and furnishes a continuous and permanent line of levee opposite the Jackson land. Its effect in flood time is, and will be, to produce an increased flood stage of about four feet of water on the Jackson lands, in addition to the increased elevation of six feet in flood height as the result of other portions of the levee system located above and below said land. This levee was constructed by the United States authorities alone, as stated in Finding XVII, page 30, of printed record.

During the time the Bougere levee was reaching a state of completion the appellants' lands were partially overflowed in 1906, overflowed three times in 1907, five times continuously in 1908, for a period of

129 days, and two times successively in 1909. The effect of the frequent and successive overflows in these years was to drive away the tenants, cover 1,700 acres with sand and silt deposits from 6 inches to 6 feet in depth; said land has grown up with weeds, young willows, and cottonwood from 6 to 15 feet in height; many of the buildings, houses and cabins formerly on said lands have been lifted from their foundations and washed into the fields, the floors torn up, the fencing on said land washed away and torn to pieces by the swift currents of the water running over said land; and said lands have been destroyed for agricultural and other purposes and have no market value, as stated in Findings VI and XVIII, pages 25 and 30, of printed record.

**Levee System Described.**

III.

Levees or embankments are constructed on the surface of the land on both sides of the river practically the entire distance from Cairo to Vicksburg (or to Brunswick, just north of Vicksburg), thus restricting and making narrower the high-water channel of the river from Cairo to Vicksburg. The levees on the west side of the river have been continued practically the entire distance to the Head of the Passes, 1,050 miles south of Cairo and about 30 miles north of where the river empties into the Gulf of Mexico.

The levees or embankments on the west side of the river restrict the high-water flow of the river, making it from 20 to 30 miles narrower according to the width of the Tensas and Atchafalaya Basins placed on the

outside of the levees. That is, the high-water channel of the river is made narrower and the high-water flow confined to the main channel of the river, that part of the natural high-water bed of the river which lies between the levees on the west side of the river and the foothills on the east side of the river having a width of from 2 to 6 miles, according to the respective widths of the six small basins located in the Homochito levee district, between Vicksburg and Baton Rouge.

In other words, the Mississippi River at flood stage is, by the levee lines or embankments on the west side of the river, compelled to flow from Vicksburg to Baton Rouge through a high-water bed from 2 to 6 miles in width, while before the improvements—that is, before the construction of the levees on the west and opposite bank—the river at its flood stage by the laws of nature flowed through a high-water bed in this same stretch of territory from 20 to 35 miles in width.

The same state of facts as to the confinement of the flood waters to the restricted high-water bed exists in the St. Francis Basin north of Helena, Ark., on the west side of the river, and from Helena, Ark., to Vicksburg in the Yazoo Basin, on the east side of the river, and the Upper Tensas Basin on the west side; that is, north of Vicksburg the high-water flow of the river is confined to the restricted high-water bed between the two lines of levees; the line of levees on the east side and the line of levees on the west side. Confining the high-water flow north of Vicksburg to the restricted high-water bed caused an increased elevation in the flood heights of approximately six feet, and the waters flowed down this restricted chan-

nel with a current stronger, more forceful and destructive, and at Vicksburg or Brunswick, just north of Vicksburg, in the Yazoo Basin, the flood waters released from the confinement on the east side spreads out over the territory lying between the levees west of the river and the foothills east thereof, to which the levees have been connected, with a current stronger, more forceful and destructive. In this last-mentioned strip of territory is located the Jackson land, and the damage done to said land by the confinement of the waters above, releasing them on the east side at Vicksburg, and the obstruction of the flood waters by the line of levees or embankments on the west side of the river above, below and opposite to the Jackson land, results in the destruction of the Jackson land.

Not only are the flood waters confined in a narrower channel north of Vicksburg and obstructed by the levees or embankments on the west side from Vicksburg to Baton Rouge, which increases the quantity of the flow in this narrower high-water bed of the river between Vicksburg and Baton Rouge, but the high-water flow is also obstructed on both sides of the river south of Baton Rouge as a result of the confinement of the flood waters by the construction of levees on the east and west sides of the river from Baton Rouge to the Head of the Passes; that is, the high-water bed from Baton Rouge to the Head of the Passes since the construction of levees or embankments on either side of the river has been restricted from a width of approximately 35 or 40 miles to a width of from 1 to 5 miles, varying in width according to the distance between the two levee lines. This restriction of the high-water bed to the territory between the two levee lines south of Baton Rouge

compels the flood waters to flow through a restricted and narrower channel from 1 to 5 miles wide to the Gulf of Mexico, instead of through a channel from 35 to 40 miles wide to the Gulf, as before levee construction, which necessarily interferes with the free flow of the high water to the Gulf; that is, the levees on either side of the restricted high-water bed from Baton Rouge to the Gulf obstructs the free flow of the flood waters by narrowing the high water bed to the Gulf.

**Discussion of Facts as Found by the Court.**

IV.

Fact I, page 18, of printed record, shows the natural outlets for the free flow of the flood waters through the basins and drains into the Gulf before obstruction by levees on both sides of the river.

The last paragraph of this finding shows the location of the Jackson lands to be at Jackson Point, 40 miles below Natchez and 25 miles above the mouth of Red River, and that their private levees have been destroyed and washed away in recent years as the result of the levee system.

Facts II and III and IV, pages 19 to 22, of printed record, show ownership and value of property.

Fact V, page 22, of printed record, shows:

(*a*) That the Jackson lands are located in a *small basin* between Ellis Cliff and Fort Adams, in the Homochitto Levee District, which has a width from 2 to 6 miles. The distance between the two levee lines north and south of the Homochitto Levee District is about the same as the distance between the levee on the west bank of the river and the foothills

on the east side of the river, where these lands are located, between Vicksburg and Baton Rouge, as shown by the Map of the Alluvial Valley filed with the Report of the War Department on March 6, 1911.

(*b*) That the foothills in the Homochitto Levee District serve the purposes of a levee line. The Map of the Alluvial Valley filed March 6, 1911, shows that the levee lines on the east side of the river south of Baton Rouge is connected with the foothills at Baton Rouge, making, and are used as, a continuous line of levee on the east bank in times of high water.

(*c*) That the Mississippi River Commission, having the work in charge for the United States, recognizes the destruction of the Jackson land and admits liability by recommending settlement.

The Commission's Report for 1894, (pages 22-23 of printed record) states that it was informed of the Jackson suit in the Court of Claims at that time. The Report of 1896 (page 23 of printed record) shows that Col. Derby, the Engineer Officer in charge of that district, caused a completed survey to be made of all the lands within that district, subject to overflow, with a view of ascertaining the cost of levee construction and the number of acres of land to be protected thereby. Said report shows that the cost of levee construction is greater than the value of land which it will protect, and that *the construction of levees in this district is not important to the improvement of the river for navigation;* the reason given by him is, that the foothills serve the purposes of levees, compelling the water, after flooding the Jackson land, to return to the channel in times of high water.

A full statement of the effect of levee construction

on the Jackson land will be found in the Commission's Report for 1910, pages 2937-38, to which reference is made in Finding V, first paragraph, page 23, of printed record, which is as follows:

EXTRACT FROM THE REPORT OF THE MISSISSIPPI RIVER COMMISSION.

OFFICE MISSISSIPPI RIVER COMMISSION.

*St. Louis, Mo., June 30, 1910.*

"The attention of Congress has been called in former years, beginning as far back as 1894, to the situation of the narrow and irregular strip of land lying between the Mississippi River and the highlands east of it between Vicksburg and Baton Rouge, a distance of 234 miles by the river. Within these boundaries the alluvial lands are cut across by a number of small streams coming in from the hills, so as to form, in connection with the devious course of the river, detached areas difficult of protection by levees. The elevation of the general flood levels, which has resulted from the extension of the levee system in recent years, subjects these lands to deeper overflow than they were subject to formerly or would be subject to now if the levee system were not in existence. The people living in the larger of these overflowed areas have been clamoring for aid in the building of levees to protect their lands for 16 years past; but the commission has been unable to see its way to the recommendation of allotments for that purpose out of the appropriations, for the four reasons that the construction

of levees along these fronts did not appear to have an important value here as elsewhere in the improvement of the channel; and the expense of them was out of proportion to the value of the lands to be protected; and the inhabitants were unable to bear the share of the expense which the commission required as a condition of Government aid elsewhere; and the funds appropriated from year to year were all necessary for other works of larger importance.

"Some of the landowners in these areas have brought suit for damages in the Court of Claims, which, though pending for many years, have as yet been unavailing. While it is not within the province of the commission to express any opinion as to the legal merits of these suits, it is apparent to any one that there must be great difficulty in the way of adequate relief in that manner.

"The immediate cause of the injuries complained of is the increased elevation of the flood heights. That is the result of the general confinement of flood discharge by the levee system as a whole. That system has been constructed in part by the United States, but in larger part by the various levee organizations along the river, created by the laws of the States bordering it. The case is manifestly one for legislative rather than judicial treatment. Relief in some form ought in justice to come from Congress and the State legislature in co-operation. But such co-operation would be so difficult to attain that it is hardly worth the thought. Meanwhile the litigation drags its slow

length along, the lives of the landowners are passing away, and hope deferred is making their heart sick.

"The situation is pathetic and distressing in the highest degree. That these people should be condemned to perpetual inundation without possibility of relief or redress for the sake of an improvement from which their fellow citizens are enjoying great benefits is intolerable to any man's sense of justice.

"It appears to the commission that there are three possible ways of dealing with the problem. One is to assist the owners of the inundated lands by helping them to build levees where that method of protection is economically possible. Another is to compensate them in damages for the injuries which they have sustained. A third would be to buy the lands and devote them to forestry. There is more to be said in favor of the last of these suggestions than might appear at first blush. The lands are capable of growing many kinds of valuable timber. They could be made to produce much material for revetment and other works of improvement in the river. If the fields were abandoned to natural growth the land would be gradually built up by deposit and they might become highly valuable for cultivation."

(*d*) That the Jackson lands cannot be protected by the owners by the construction of private levees. This is shown by Col. Derby's report, wherein he says, that the cost of levee construction is greater than the value of the land to be protected. Reference to Plate 4, accompanying his report, shows that the location

of a levee line would be such as not to protect the Jackson lands. It would still leave the land between the levee and the river in an artificial and narrower channel of the river.

The Report of Col. Derby is referred to in the fourth paragraph of Finding V, page 23, of printed record, and the Commission's Report for 1896, after having before it Col. Derby's surveys, maps and report, is referred to in paragraphs 5, 6 and 7 of Finding V, page 23, of printed record.

(*e*) The Map of the Alluvial Valley, and the maps and report of Col. Derby show that the neighboring lands to the Jackson lands, on the same side of the river, are of the same elevation and would require the same levee protection as the Jackson lands. This is true of lands located along the river bank for many miles above and below the Jackson lands. The Jacksons would have no right to go onto the neighboring lands and construct levees under the right of eminent domain, to say nothing of the cost of levee construction, or the price to be paid for neighboring lands. In addition to this, the record shows that their private levees have been destroyed and washed away in recent years, as the result of the completed levee system, and that the owners have exhausted their means in an effort to thus protect their lands.

Fact VI, page 25, of printed record, shows the *invasion, destruction and abandonment of land* as the result of the adoption, extension and completion of the levee system by the United States as a whole. The taking in connection with Facts XI-XVIII, pages 27 and 30, of printed record, is shown. The frequency of overflows since the completion of levee system is also found.

Fact VII, page 25, of printed record, shows that before completion of levee system the overflows of said lands *"did not materially affect their productive capacity or impair their market value."*

Facts IX and XIII, pages 26 and 28, of printed record, in connection with Fact I, show how the natural outlets, before levee construction, afforded accommodations for the natural and accustomed flow of flood waters. The lands were then profitably cultivated. (Facts 9, 13 and 18, pages 26, 28 and 30, of printed record).

Fact X, page 26, of printed record, shows the creation of Mississippi River Commission and Act of Congress adopting the Eads plan providing for the systematic improvement of the river and a *continuous line of levees* from Cairo to the Gulf. It also shows the permanent confinement of the flood waters in a narrower channel with increased elevation of at last six feet, producing more frequent and destructive overflows.

Fact XI, page 27, of printed record, attempts to describe the levee system from Cairo to the Gulf, showing that the foothills on the east bank, from Vicksburg to Baton Rouge, *hug closely the river bank*, at points from 2 to 6 miles distant from the river, in which strip of territory the lands of appellants lie.

This fact XI also shows that the Federal Government has assumed *permanent control* of the levees heretofore built by State and local authorities; that the lands are subject to deeper and more frequent and destructive overflows since the completion of the levee system than before, which is the result of the general confinement of the flood discharge by the *levee system as a whole.*

When speaking of the Jackson lands this fact also says, "and consequently has destroyed its value for agricultural and grazing purposes, causing its abandonment for that purpose since the year 1908."

Fact XII, page 27, of printed record, shows the closing of crevasses from year to year.

Fact XIII, page 13, of printed record, in conjunction with Finding IX, (page 9) shows that "before the joining of the levee lines by the United States, in accordance with the Eads plan, (*thus making the same continuous*), there were occasional overflows of claimants' land, but they have been made deeper, more frequent and more forceful by the adoption and completion of the levee system. *However, these overflows, before the adoption of the levee system, did not materially damage said land and it still remained valuable for agricultural purposes.*"

Fact XIV, page 28, of printed record, shows the value of crops of cotton raised on appellants' land from 1896 to 1907, inclusive. It also shows that during that period it was not profitable for them to raise crops thereon. It cost more to plant, cultivate, gather and market a crop than it sold for in the market. Since 1907 the overflows have been so frequent and destructive as to destroy the land and compel its abandonment.

The completion of the Bougere levee, opposite the Jackson lands, in 1910, by the United States alone, which is 29 miles in length and 23.4 feet in height, and from 3 to 5 feet above highest known water, finally resulted in the destruction of appellants' lands. (See last paragraph Finding XV, page 29).

Fact XV, page 29, of printed record, shows the adoption of the Eads plan, calling for a *continuous*

line of levees from Cairo to the Gulf, and the *adoption* and *use* of the local levees by the United States.

The *permanent control* of the levee system by the United States was *judicially determined* by the Court ofClaims in case of Maria L. Overton *vs.* The United States, 45 Court of Claims Report, page 17, (syllabus 9, p. 19).

This fact also shows that the United States authorized the extension of the levee system from Cape Girardeau, Mo., to the Head of the Passes by Act of Congress in 1906.

Also, that *the Mississippi River Commission authorized and directed the raising of all levees from 3 to 5 feet above the highest known water occurring to June, 1910. This shows conclusively that the United States has disturbed natural conditions; constructed all levees from 3 to 5 feet above highest known water, and thereby obstructed the natural flow of the water on both sides of the river.* (See Finding XVIII, page 30).

Fact XVI, page 30, of printed record, shows that the United States practically constructed the entire levee system in the Tensas Basin, which is opposite the Jackson lands.

Fact XVII, page 30, of printed record, describes the location of the Bougere levee line, opposite the Jackson lands, and states that "its effect, in flood times is, and will be, to produce an increased flood stage of about 4 feet of water on the Jackson land in addition to the increased elevation of 6 feet in the flood height," as stated in the last sentence of Finding X, also Finding XVI, pages 26 and 29, of printed record.

Fact XVIII, page 30, together with Findings VI and XI, pages 25 and 27, of printed record, *show an*

*invasion of the land* by superinduced additions of water, sand and silt being permanently deposited thereon to a depth of from 6 inches to 6 feet. The more frequent and deeper overflows, for longer periods, have resulted in the land growing up with weeds, young willows and cottonwood from 6 to 15 feet in height, which has dispossessed the owners. This is an *actual invasion* which has resulted in a total destruction and caused the abandonment of the land.

Fact XVIII, page 30, of printed record, further shows that the same floods have caused many of the buildings, houses and cabins, formerly on said land, to be lifted from their foundations and washed into the fields, the floors torn up, the fencing on said land torn to pieces and washed away by the swift currents of water running over said land, thereby totally destroying said improvements.

**Disturbance of Natural Conditions.**

V.

The foregoing facts show that the United States has disturbed natural conditions and has obstructed the flow of water in times of flood, in the following particulars:

*First.* Surveyed and adopted an artificial channel for the high-water flow of the river, reducing the area of overflowed land from 20 to 40 miles in width. This is the result of closing the natural outlets left by nature.

*Second.* Adopted to its use the unconnected lines of levees built by State and local authorities, closed

the gaps and outlets as they existed, perpetually confining the high-water flow of the river in its restricted and narrower channel, producing an increased flood elevation of at least 6 feet.

*Third.* Raised the height of levees in 1910 from 3 to 5 feet above the highest known water occurring up to that time.

*Fourth.* Closed the Bougere Crevasse opposite the Jackson land, producing an increased flood height of about four feet of water thereon in addition to the increased elevation of 6 feet in flood time by other portions of the levee system. This deflected the water across the stream and holds it on the Jackson land for a much longer period than it remained before the levee system was completed.

*Fifth.* By building a completed levee system above, opposite to and below appellants' land, narrowing the high-water channel of the river, checking the flow of water, causing it to enter on, back upon and overflow it, and remain thereon for a much longer period than before levee construction.

*Sixth.* The closing of the natural outlets left by nature, and confining the water in a narrower channel and raising its level, increased the velocity and scouring power of the current, and makes the overflows deeper, more frequent and more destructive.

*Seventh.* Caused the lands of appellants, which prior to 1890 were highly improved, well stocked with tenants and laborers, and valuable for raising crops of cotton, cotton seed, corn, hay and other products, to be rendered valueless and abandoned.

## ARGUMENT AND BRIEF.

### VI.

It is respectfully submitted that the Court of Claims erred in the following particulars:

1. The only question involved in these cases being one of law, the Court of Claims erred in Cases Nos. 718 and 720 in not finding that the United States had taken the private property of claimants for public use, and are liable to them for the value thereof under the provisions of the Fifth Amendment to the Constitution of the United States.

2. That said Court erred in dismissing the petition of claimants in Case No. 720.

3. That said Court erred in dismissing the petition of claimant in Case No. 718, as to the Wigwam Plantation.

4. That said Court erred in not ascertaining and allowing claimants in each of said cases, namely, Nos. 718, 719 and 720, for the value of the rents, crop losses and improvements destroyed.

The first question to be determined on appeal is whether or not the public works of the United States, and their effect on the land of appellants, is to be determined by the law of the State courts or the Federal courts.

We respectfully submit that the right of the United States, along the Mississippi river, a navigable fresh

water stream, to construct levees or to make a new bank for the river; or, by artificial structures, which has the effect of turning the water upon the land of a riparian owner on the opposite side of the river, is not a local question, but one depending for its determination on the general principles of law, on which decisions of the State courts are not binding on the Federal courts.

(Cairo V. & C. Ry. Co. v. Brevoort, 62 Federal, 129.)

The next question of importance to be determined on appeal is the property right of a riparian owner to lands bordering on the Mississippi River, and what constitutes the bed and bank of that river.

We respectfully insist that "the bed," which is a definite, and commonly a permanent channel, is the characteristic which distinguishes the water of a river from mere surface drainage flowing without definite course or certain limits, and from water percolating through the strata of the earth, both of which are not subject to riparian rights, but form part of the realty, and belong exclusively to the owner of the realty.

"The bank of a river is that elevation of land which confines the waters of the river in their natural channel when they rise the highest, and do not overflow the banks. And, in that condition of the water, the banks, and the soil which is permanently submerged, form the bed of the river. The banks are a part of the river bed; but the river does not include lands beyond the banks which are covered in times of freshet or extreme floods, or swamps or low ground which are liable to overflow, but are reclaimable for meadows or

agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture. Fresh-water rivers, like the Mississippi, may rise and fall periodically at certain seasons, and these have defined the high and low water marks. "Low water mark" is the point to which the river recedes at its lowest stage. "High-water mark" is the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation, and to destroy its value for agriculture."

(Paine Lumber Co. v. United States, 55 Federal, p. 864).

(Carpenter v. Board of Comrs., 56 Minn., 513).

"Land which is merely covered by freshets or floods, which recede at once, or remain there but temporarily, and, after the water recedes grass grows upon it, cattle pasture upon it, or crops grow upon it, then such land does not constitute the bed of a river, the title to which is in the owner of the property, and is realty, which the owner has a right to improve; and if it has been damaged or taken by the Government of the United States it must make just compensation for the injury occasioned."

(Paine Lumber Co. v. United States, 55 Federal, pages 865-866).

(Carpenter v. Board of Comrs., 56 Minn., 513).

The right of the Federal government in property is either proprietary or governmental. In the first instance it can sell and alienate like the individual; in the second instance it can neither sell nor alienate, it can only control the flowage of navigable streams,

and the like, in the interest of all the people. Its right to control a flowing navigable stream is one of passage only.

(Woodruff v. N. B. G. Co., 18 Federal, pp. 782-3-4 and 7; also 809-10.
(Lewis on Eminent Domain, 3d Edition, secs. 80 and 85).

The banks of a navigable stream, and the land adjoining, being private property, cannot be occupied without compensation. If the public works cause private property to be overflowed, compensation must be made.

(Lewis on Eminent Domain, 3d Edition, secs. 80 and 85).
(Magnolia v. Marshall, 39 Miss., 110-136).

**Joint Liability.**

VII.

It is no defense to an action for flowing of land that the dams and levees of defendant and others *jointly* caused the flowing.

Arimond v. Green Bay & Miss. Canal Co., 35 Wis., p. 41.
Addison on Torts, secs. 82-3-4, pp. 119 and 120.
Boyd v. Watt, 27 Ohio St., 259.
See 25 Ohio St., 255.
Pollett v. Long, 56 N. Y., 205.
Arctic Fire Ins. Co. v. Austin, 69 N. Y., 483.
Chipman v. Palmer, 77 N. Y., 56.
Woods on Law of Nuisances, Sec. 862, p. 893; also Secs. 821-2, pp. 868-9.
Lull v. The F. & W. I. Co., 19 Wis., 102.
Vol. 6, Am. & Eng. Enc. Law, p. 434.

Strickland v. Barrett, 20 Pick. (Mass.), 417.
Bard & Wenrich v. Yohn, 26 P. St., 489.
13 Am. & Eng. Enc. Law, p. 75.

**Liability of the United States.**

VIII.

The United States having assumed permanent control of, and adopted to their use, making them larger and stronger, the levees built by State and local authorities, knowing that the right to use them could only be obtained by payment of just compensation to the land owners who had and would suffer injury by overflows as the result of their act, they, in legal effect, assented to the performance of this obligation, and suit on an implied promise to make just compensation can be maintained against the United States.

Brooms' Legal Maxims, p. 79.
Lewis on Eminent Domain, Secs. 887-8, pp. 1543-4.
Oregan v. Memphis R. R. Co., 51 Ark., 235.
N. Y. R. R. Co. v. Hammond, 132 Ind., 475.
Rio Grande R. R. Co. v. Artiz, 75 Tex., 602.
First Am. R. R. & Cor. Rep., 344.

**Consent to Be Sued.**

IX.

Under acts of Congress the United States has given its consent to be sued on all contracts, express or implied, and on all claims founded upon the Constitution of the United States or any law of Congress.

Belknap v. Schilds, 161 U. S., p. 17.
U. S. v. Lynah, 188 U. S., 475.

**Levees on Opposite Side of Stream.**

X.

A riparian owner of land on one side of a stream has no right to build levees upon his side which will prevent the escape of flood waters, in times of ordinary flood, over his side and cast them upon the owner of the opposite side.

Rex v. Trafford, 20 Eng. C. L. R., 498; 1 B. & Ad, 874.
Cairo V. & C. Ry. Co. v. Brevoort, 62 Federal, 129.
Paine Lumber Co. v. U. S., 55 Federal, 854-5; also 864-5.
Woodruff v. N. B. G. M. Co., 18 Federal, 782-3-4; also 797 and 809-10.
Jones, Admr., v. U. S., 48 Wis., 385.
Velte v. U. S., 76 Wis., 278.
Burwell v. Hobson, 12 Gratt., 322.
O'Connell v. The E. T., Va. & Ga. R. R. Co., 87 Ga., 246-261.
Garrish v. Clouch, 48 N. H., p. 9.
Parker v. City of Atchison, 48 Pac., 631-2.
S[illegible] The K. C., St. Joseph & C. B. R. Co.,

[illegible]. Clark, 2 Ind Ter., 319.
[illegible] City of Portage, 79 Wis., 126.
Crawf[illegible] v. Rumbo, 44 Ohio State, 279.
Sulli[illegible] v. [illegible]ey, 31 Tex. Civ. App., 589.
Byrd [illegible], 11 Ohio State, 362.
Myer[illegible]ouis, 8 Mo. App., 266.
Menzies v. [illegible]eadalbane, 3 Bliss N. S., 414, 423.
Rix v. Johnson, 5 N. H., 520.
Jones v. Soulard, 24 How. (U. S.), 41.
Adams v. Frothingham, 3 Mass., 352.
Rex. v. Lord Yarborough, 3 B. & C., 91.
Scranton v. Brown, 4 B. & C., 485.

Tillotson v. Smith, 32 N. H., pp. 90-95.
Carlson v. St. L., R. D. & I. Co., 75 Minn., 128.

If in closing up natural outlets for waters in flood time the force of the current is directed to the channel on the opposite side, resulting in a destruction of private property which would not have occurred had the water been left to flow in its natural course, gives a good cause of action.

Barden v. City of Portage, 79 Wis., 126.
Hotard v. T. R. Co., 36 La. Ann., 450.
Hartshorn v. Shaddock, 40 N. Y. Sup., 953.
R. R. Co. v. Carr, 38 Ohio State, 448.
Wallace v. Drew, 59 Barb. (N. Y.), 413.
Kansas City v. Slangstorm, 53 Kan., 431.
Salisburg v. Herch, 106 Mass., 458.
Tuthill v. Scott, 43 Ver., 525.

**Adoption of Foothills to Serve as Levees.**

XI.

If the United States had constructed levees on the east bank of the river from Vicksburg to Baton Rouge to obstruct and thereby confine the flood waters on that side, instead of using the base of the hills for that purpose, and had located those levees where the base of the hills now is, or near the banks of the river, there would have been a taking both of the right of way on which the levees would have stood and of the land between the line of levees and the river.

Inge v. Police Jury, 14 La. Ann., 117.
Penrice v. Wallis, 37 Miss., 172.
United States v. Hughes, No. 719.

Now, if the United States, instead of constructing levees on the east bank to confine the flood waters,

finds it cheaper to use the base of the hills, to which the levees have been connected, skirting the river for that purpose, and thereby place the lands of appellants within the adopted artificial channel, how can it be said that there is any the less a taking of the lands as a part of the high-water bed of the river.

Penrice v. Wallis, 37 Miss., 172.

It is not a case in which the United States has intervened to protect private property from overflow, but one in which the United States, for its own purpose, has diverted the flood waters from their natural flow and course through the lowlands and basins and confined them to the adopted artificial channel; and if the United States has taken the lands of appellants, by putting them between the line of levees and the bank of the river, or by using the highlands to which the levees have been connected, skirting the river instead of building levees to confine the flood waters, we respectfully maintain that it is as much a taking as if there had been an actual appropriation of the land.

The United States, being a public body, speak only through their representatives. They cannot speak orally like the individual. In transactions like the one here involved they keep public records and documents, the contents of which the law recognizes as documentary evidence, to be construed either for or against the government. The intent of the United States can only be gathered from the contents of such records and documents, and the long-continued and successive acts of its officers and representatives.

The original petition filed in 1894 in this Jackson case charges the United States with the use and

adoption of the foothills to serve the purpose of levees. The Map of the Alluvial Valley of the Mississippi, filed in this case March 6, 1911 (which is an official map printed and published under the authority and direction of the United States, giving the location and extent of the levee system), shows the land located between the foothills and the river, from Vicksburg to Baton Rouge, on the east bank, to be a part of the proposed and subsequently adopted artificial channel of the river as contemplated by the levee system; and also further shows that the foothills are to serve and do serve the purpose of levees.

The only answer made by the United States to this allegation of the original petition filed in this suit is to be found in the Report and Surveys made in 1895 by Col. Derby, the Engineer Officer in charge of that district, referred to in Finding V, pages 22 and 23, of the printed record; the Commission's report of 1896 and 1910, referred to in the same Finding, in which it is stated that it was cheaper to flood the land and pay the damage than to build levees; that the lands are now subject to *"perpetual inundation"* and that the people have *"no possibility of relief."*

The United States does not deny its use of the foothills. It could not continue levee improvement without the appropriation of this land as a part of the general plan of the public work. The maps and surveys show this fact. The burden is on the United States to disprove this contention if it is not true. It has not even attempted to do so. What the ordinary layman might now say as to the intent of the United States is not controlling. What the United States has done is controlling. The public works show what has been done.

When the Jackson suit was begun in 1894, the Congress of the United States had, before that time, adopted the Eads plan and recognized and taken charge of the public work. The Mississippi River Commission had accepted charge of the work; had annually expended the appropriations made by Congress; and had for several years made the same regular estimates for this work that it did for other work under its control and management. These acts on the part of Congress, the executive departments of the government and the Mississippi River Commission constitute an adoption of the levee system, and the taking of exclusive control of it. *"They amount to a declaration of the Federal government that we here interpose and assert our power. We take upon ourselves the burden of this improvement, which properly belongs to us, and that hereafter this work for the public good is in our hands and subject to our control."*

Wisconsin v. Duluth, 96 U. S., 386-7.
Overton v. U. S., 45 Ct. Cls., p. 17 (Syl. 9, p. 19).

**What Constitutes a Taking.**

XII.

What constitutes a *"taking"* of private property for public use has been frequently decided by the Supreme Court of the United States. The first important case to be found is that of Pumpelly v. Green Bay Company, 13 Wall, 166, followed by the Lynah case, reported in 188 U. S., 445.

The facts in the Pumpelly case, *supra*, in part are:

> "The Green Bay and Mississippi Canal Company erected a dam across Fox River, the northern outlet of Lake Winebago, raising the water of the lake so high as to forcibly and with violence overflow 649 acres of Pumpelly's land, the water coming with such violence as to tear up his trees and grass by the roots, and wash them, with his hay by the tons, away, to choke up his drains and fill up his ditches, to saturate some of his lands with water, and to dirty and injure other parts by bringing and leaving on them deposits of sand, and otherwise greatly injuring them. This dam was not on Pumpelly's land, but removed from it some distance. The overflow was the result of the building of the dam."

The law laid down in the Pumpelly case, *supra*, and followed by the Lynah case, *supra*, and similar overflow cases, is the established law of the land. Neither have been overruled, but frequently approved by subsequent decisions.

Facts in the Lynah case, *supra*, in part, are:

> "The dams, training walls, jetties and other obstructions were not located on the Lynah land, but many miles therefrom, along the shore of the Savannah River, extending from the bank out into the bed of the river, which at times produced an increased flowage of 18 inches of water on the land; that is, backed the water on the land. The water was backed onto and invaded the land as the result of the public works."

When giving a statement of facts in the Lynah case, *supra*, the court (p. 451) says:

> "The government does not in a sense take this land for the purpose of *putting its obstruction on it.* But it forces back the water of the river on the land as a result necessary to the purpose, without which its purpose could not be accomplished."

Again, (p. 469) in speaking of the Pumpelly case, *supra,* says:

> "On the argument it was conceded by the learned counsel for the government (and properly conceded in view of the findings) that as far as respects the mere matter of flowing and injury there is no substantial difference between the Lynah and Pumpelly cases."

In the opinion of Court of Claims, dismissing the petition in this Jackson case, concurred in by a majority of the members, much emphasis is given to the proposition that the works of the United States in improving the Mississippi river, being done under the authority of acts of Congress in the interest of commerce, trade and the postal service, the Federal Government has the right to flow the Jackson land, and the damage done thereby is consequential. This proposition, as we view it, is completely answered by the Supreme Court's decision in the Lynah case, *supra.*

On page 471 the Court says:

> "Passing to the third question, it is contended that what was done in improving the navigability of a navigable river, that it is given by the Constitution full control over such improve-

ments, and that if in doing any work injury results to riparian proprietors or others, it is an injury which is purely consequential and for which the government is not liable. But if any one proposition can be considered settled by the decisions of this court it is that, *although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation.*"

In Monongahela Navigation Co. v. U. S., 148 U. S., 312, 336, it was said:

> "But like other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument and among them is that of the Fifth Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, *but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation.*"

In Scranton v. Wheeler, 179 U. S., 141, 153, was said:

> "Undoubtedly compensation must be made or secured to the owner when that which is done is to be regarded as a taking of private property for public use within the meaning of the Fifth Amendment of the Constitution; and of course in its exercise of power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use."

This adjudication in the Lynah case, *supra,* would seem to dispose of the contention that the Federal Government can take the Jackson land without payment of compensation.

On page 33 of the record, giving the Court of Claims' opinion in this Jackson case, it is stated:

> "The Supreme Court has said that 'the acts done in the proper exercise of government powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the Constitutional provision.' In Transportation Company v. Chicago, 99 U. S., 635, from which the above quotation is taken, the court held the municipality exempt from liability for damages unavoidably caused to an adjacent property owner by obstructing a street and a portion of the river in the course of constructing a tunnel under the Chicago river."

But on page 472 in the Lynah case, *supra,* the Court when treating of this subject says:

> "Thus in Transportation Co. v. Chicago, 99 U. S., 635, the city, duly authorized by the statute, constructed a tunnel along the line of La Salle street and under the Chicago River. The Company claimed it was deprived of *access to its premises* by and during the construction. *This deprivation was not permanent, but continued only during the time necessary to complete the tunnel,* and it was held that there was no taking of property, but only an injury. In the course of the opinion, after referring to the Pumpelly case, *supra,* and Eaton v. Boston, Concord and Montreal R. R. Co., 51 N. H., 504, we said,

> (p. 642) : 'In these cases, it was held that permanent flowing of private property may be regarded as a taking. In those cases there was a *physical invasion* of the real estate of the private owner, and a practical ouster of his possession. *But in the present case there is no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient.*"

Thus it can be seen that the doctrine established by the Transportation Company case, *supra,* has no application whatever to the Jackson case. In the Jackson case there is a *physical invasion of 1,700 acres of land now covered with sand and gravel from 6 inches to 6 feet in depth, the land has grown up with cottonwood and willows some 15 feet in height and is now abandoned:*

The Mills case (46 Fed. 738); Gibson case (166 U. S., 269); Scranton case (179 U. S. 141); and Bedford case (192 U. S., 217), have been interpreted, distinguished and applied in Manigault v. Springs, 199 U. S., 485, and after distinguishing between cases involving incidental, anticipated and consequential injury, the Supreme Court says:

> *"We think the rule to be gathered from these cases is that where there is a practical destruction or material impairment of the value of plaintiff's land, there is a taking, which demands compensation."*

We submit that as there has been a practical destruction and material impairment of the value of the Jackson land, there is a taking demanding payment of compensation. The Jacksons have been ousted of their possession and driven from their

lands. Every element of a "taking" has been proven.

This Jackson case is stronger than either of the other cases decided and referred to. The works of the United States do not *invade* the Jackson land, but it is *invaded* by the presence thereon of water, sand, gravel, etc., as the result of the works, which is true in all other cases in which the law has been settled. Then, what concievable difference is there between the Jackson, the Lynah and Pumpelly cases, *supra*, in point of facts and principles? There is none. They are as nearly identical as it is possible to find cases, except that the Jackson land is subject to a much deeper overflow and more injured than the others.

If this is not a taking within the intendment of the Constitution, then, in the terse and vigorous language of Mr. Justice Miller, "we have that curious and unsatisfactory result, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, that if the Government refrains from the absolute conversion of real estate to the use of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not taken for public use."

"The injured proprietor is equally entitled to redress whether the damage is caused by a diversion of

water, by back water, by inundation from above his land, or by percolation of the water through the banks."

Gould on Waters, Sec. 209 and Notes.

In the language of the Supreme Court in Pumpelly v. Green Bay Co., *supra*:

> "The backing of the water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand or other material, or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as, by the constitutional provisions, demands compensation.
>
> "It is not necessary that the property should be absolutely taken, in the narrowest sense of the word, to bring the case within the protection of this constitutional provision, but there may be such serious interruption to the common and necessary use of the property as will be equivalent to a taking, within the meaning of the statute."
>
> Boston & R. M. Com. v. Norman, 12 Pickering, 467.
>
> Hooker v. The N. H. & M. Co., 14 Conn, 146-160-1.

In the case of King v. United States, 59 Federal Reporter, 9, the Court held:

> "The flooding of a plantation by a government dam, so as to render it unfit for cultivation, is a taking for public use, requiring compensation, although the government actually occupies no part thereof."

and said—

> "The Government has not gone into actual occupancy of this land. But by reason of this public work, occasioned by the public work fulfilling its purpose, the water in the Savannah river has been raised at plaintiff's land, has been backed on it so that the drainage has been destroyed, the water kept on the land, and forced up into it, making it finally wholly unfit for cultivation. This is a taking of the land for public purposes, for which compensation must be provided."

This opinion in the King case has been affirmed in Lowndes v. United States, 105 Federal Reporter, p. 836. See also—

> High Bridge Lumber Co. v. United States, 69 Federal Reporter, 326.
> Paine Lumber Co. v. United States, 55 Federal, 854.
> Jones, Admr., etc., v. U. S., 48 Wis., 385.
> Velte v. U. S., 76 Wis., 278.
> U. S. v. Welch, 217 U. S., 333.
> Grizard v. U. S., 219 U. S., 180.

There was no *actual invasion by the works of* the United States in the Lynah case; none in the Williams case; none in the King case; none in the Kennedy case; none in High Bridge Lumber Co. case; none in Paine Lumber Co. case; none in Jones case; none in Velte case; none in Welch case; none in Grizzard case; none in Sewell case; all involving government improvement of a navigable fresh-water stream, similar to the works here involved, yet the land-owners recovered in all these cases. There was no *actual or physical invasion in* Pumpelly's case, *supra*, which

seems to be the leading authority. In fact, in no case yet to be found, involving the same principle as in this Jackson case, has there been an *actual invasion* of the land by the works of the United States, but as in this case the invasion was the result of the government works.

**Jurisdiction of Court of Claims.**

XIII.

The *taking* is not a question of tort, but one of implied promise within the meaning of the statute which confers jurisdiction on the Court of Claims of actions "founded upon any contract, expressed or implied, with the government of the United States."

U. S. v. Lynah, 188 U. S., 459-463.
Merriam v. U. S., 29 C. C., 18.
Johnson v. U. S., 31 C. C., 262.

In his concurring opinion in the Lynah case, *supra*, Mr. Justice Brown, at page 475, states the doctrine to be, that jurisdiction may be supported irrespective of contract or tort under that clause of the Tucker Act which vests the Court of Claims with jurisdiction of "all claims founded upon the Constitution of the United States or any law of Congress."

**Immeasureable Responsibility.**

XIV.

The question of "immeasurable responsibility" is very ably dealt with and, according to our view, disposed of in the dissenting opinion of Justices Howry

and Barney at the bottom of page 43, and top of page 44, of the printed record.

We believe that this case does not involve any question of this kind.

The Mississippi River Commission, in its report for 1910, pages 2937-8, and as found by the Court of Claims in Finding V (page 24 of printed record), states that "these lands are capable of growing many kinds of valuable timber; that they could be made to produce much material for revetment and other works of improvement in the river. If the fields were abandoned to natural growth, the land would be gradually built up by deposit and they might become highly valuable for cultivation."

The Findings in this case show conclusively that the lands involved have no market value and have been abandoned for the purposes for which they were used by the owners. They, therefore, have no value to the owners, but do have a prospective value to the Government. While the loss is now absolute to the appellants, it would not be to the Government. The prospective value, being remote, depending upon future growth of timber and deposits, elevating the land, in years to come, the Government could afford to wait that time, but not so with the individuals whose lives are annually passing away.

As far back as 1890 Major B. M. Herrod, a member of the Commission, and Smith S. Leech, U. S. Engineer, testified under oath before the Senate Committee on Commerce (Report 1890, pages 69 and 213) that the Government was aware of the nature of the work and liability it was undertaking.

The report of Col. Derby, referred to in Finding V, page 23, of record, will be found on pages 3472-3

of the Commission's report for 1896, and the maps made as the result of his survey of the Homochitto Levee District will be found in Appendix XIII to said report, which shows the number of acres overflowed, the value of same, cost of levee construction, etc., completely refuting the contention of the majority members of the Court of Claims that this case involves a question of "immeasurable responsibility."

This report shows:

| Location of Basin | Number of acres which would be protected. | Value of same. | Cost of levee. |
|---|---|---|---|
| Warrenton to Grand Gulf (Big Black district) | 15,500 | $121,000 | $214,000 |
| Rodney to Cole's Creek | 16,926 | 127,000 | 144,000 |
| Natchez to Ellis Cliff | 16,537 | 89,000 | 25,000 |
| Ellis Cliff to Fort Adams | 23,375 | 206,500 | 413,000 |
| Fort Adams to Tunica | 17,861 | 134,000 | 59,000 |
| Tunica to Bayou Sara | 32,000 | 117,500 | 254,000 |
| | 122,199 | $795,000 | $1,009,000 |

It will be seen from this report that at the time of making it, in 1895, it would cost the government $214,000 more to construct levees to protect the land overflowed than to pay the value of the land at that time.

It may be true that the value of the land has been reduced as the result of overflows as they occurred prior to 1895, or that the land would be more valuable now than at that time, were it not overflowed, but if we give to the land the value found by the Court of Claims still the question of "immeasurable responsibility" could not be involved.

It will be conceded that payment of any judgment rendered for the value of the land must be made in

public money, which the people pay by way of levies and taxes. If the public does not complain of the question of so-called "immeasurable responsibility" we cannot see why a court, upon its own authority, should raise the question for the first time after ignoring it both times the case was tried on demurrer.

(31 Ct. Clm., 318, and Court's Decision of April 7, 1901.)

If it is a question of having the public endorse the proposition of payment to this class of injured and suffering citizens, we beg to state, although going out of the record, but referring to a matter of current history of which the Court will take judicial notice, that the national platforms of the Republican, Progressive and Democratic parties of 1912 have endorsed the improvement of the Mississippi river by the United States, in levee construction, *as a national proposition,* and have declared in favor of the Federal Government assuming the responsibility.

The Congress of the United Staes for the year 1912 has appropriated the sum of $6,000,000 to continue the annual improvement of this river, notwithstanding the injury already done. It has known since 1894 of its liability. The Commission has each year been reporting to it.

In the Homochitto Levee Basin, between Vicksburg and Baton Rouge, on the east bank of the river, there are only about seventy cases pending in the Court of Claims similar to the Jackson case. They involve about 68,561 acres of land at a claimed value of $2,560,000, as alleged in the petitions filed in the several cases.

The crop losses therein claimed were disallowed by sustaining the government's demurrer in the Jackson case, 31 Court Claims, 319, and again by that court's decision of April 7, 1910.

The Hughes cases (Nos. 718 and 719, heard with this case) will control only about four cases now instituted in the Court of Claims, involving land values to the extent of about $200,000.

A large number of cases come from the State of Louisiana. In these cases the question of seepage and servitude under the provisions of the Louisiana State Constitution is involved. So far the government has been able to win the Louisiana cases by a decision in the Overton case, 45 Court of Claims, 17.

When it is stated by the learned judge writing the dissenting opinion of the Court of Claims in this Jackson case (page 44, of printed record) that these overflow cases involve "but little over 100 farms and the whole value of land thus taken being worth probably over $7,000,000," his estimate includes the Louisiana cases.

## Opinion of Court of Claims Discussed.

### XV.

In the opinion of the majority members of the Court of Claims dismissing the petition, at top of page 32, of the printed record, it is stated that there must be "an actual overflow of such a permanent character as to *imply an intent* to take, and a correlative obligation to pay for the land so taken."

When the Court finds that land has been destroyed as a result of Government works, which has been

done by the findings in this case, the law implies the *intent to pay* just compensation as required by the Fifth Amendment to the Constitution.

To recover it is not necessary to show an *intent* by implication, or otherwise, to take, it only being necessary to show a destruction as the result of authorized government works.

The construction of the completed levee system, causing the destruction of the Jackson lands, was authorized by Congress in 1906 (34 Stat. L., 208.).

The reports of the Mississippi River Commission treating of this subject, and referred to in Finding V, page 22, of the printed record, show that that Commission knew that the construction of the levee system as a whole would cause a destruction of the Jackson lands. The injury has been recognized as far back as 1894 by the River Commission and its officers. Its report for 1910 admits the *"perpetual inundation"* and destruction of the Jackson lands, and says that for the Jacksons to be without possibility of relief or redress for the sake of an improvement from which their fellow citzens, living behind the levee on the opposite side of the river, "are enjoying great benefits, is intolerable to any sense of justice." (See Mississippi River Commission's Report, 1910, p. 2938.)

On page 33, of printed record, the Court says:

Findings VI, XI and XVIII (pages 25, 27 and 30, of printed record) show that the lands have been *encroached upon* and *actually invaded* by superinduced additions of water, sand and silt being permanently deposited thereon. and that their value has been destroyed (*not impaired*), and abandonment compelled since 1908.

On page 33 of printed record the Bedford case is referred to, and on page 40 it is stated that the ruling of the Supreme Court in the Bedford case, alone, precludes a judgment.

On this same page the court says that in Bedford's case the improvements were constructed in the river to prevent further erosion of the banks, which is true. In Jackson's case the improvements are placed on top of the bank, far removed from the immediate bank of the river, (as was also true in the Lynah, King, Kennedy, Williams, and other cases) for the purpose of obstructing the high-water flow and confining it to a narrower channel, *and not to prevent erosion of banks.*

The improvements in the Bedford case was revetment placed against the bank and, as Finding IV in that case states, *below high-water mark.* (192 U. S., p. 217.)

In Jackson's case the taking has occurred by the construction of a levee system as a whole and making them from 3 to 5 feet above highest known waters, not only above *high-water stage,* but the *highest known waters,* by closing the Bougere Crevasse for the sole purpose of *obstructing* the high-water flow in the former natural outlets and drains.

The purpose of revetment is to prevent erosion. The purpose of a levee is to obstruct the flow of the water and in many cases increases or causes erosion. In Bedford's case the purpose of the revetment was to prevent erosion by the waters to high-water mark, *but not above.* The purpose of a levee in the Jackson case was to *obstruct the flow of water when it gets above the high-water mark,* and not below it. The revet-

ment in Bedford's case is totally submerged when there is enough water in the river to reach a levee placed on top of the bank. The object of revetment and a levee are entirely different and serve a distinct purpose. . .

The Government's maps in the Hughes case show that the Huntington Short Line Levee was built about 6 miles from the low water bed of the river, and therefore about 6 miles from the river's bank. Can it be said that this levee was built to prevent erosion of the bank in either low or high water stage? Defendant's map on Alluvial Valley filed March 6, 1911, shows that in many cases levees have been built from 4 to 6 miles back from the low-water bank of the river, as was done in the case of the Huntington Short Line Levee in the Hughes case.

The last sentence of the last paragraph of Court's opinion, page 33, of printed record, says:

> "In the consummation of this purpose, and because of the revetment work, the waters of the river were deflected toward the land of Bedford."

This is an incorrect statement. The fact is, that in Bedford's case the water, after hitting the revetment, pursued the same course that it would have pursued had it hit the bank; in other words, the revetment was placed against the bank, and the water hit the revetment instead of the bank. There was no obstruction at all to the high-water flow, for the reason that, as Finding IV in that case states, the revetment was placed against the bank *below high-water mark*, while in Jackson's case the levees opposite to, above and below the Jackson land, on both sides of the river,

*obstruct* the high-water flow and confine it within a narrower channel, with increased flood height, etc.

Finding VII in Bedford's case states that—

> "The cause of the deflection of the river upon the claimants' land was the cut-off, which shortened the distance of the stream six miles and thereby increased the velocity of the current, and forced the current, when it struck the Mississippi bank, at an abrupt angle. The revetment did not change the course of the river as it then existed, but operated to keep the course of the river at that point, as it then was, * *. The injury done to the claimant's land was the effect of natural causes."
>
> (36 Ct. Cls., pp. 474, 477; 192 U. S., pp. 217-219.)

On page 40, of printed record, it is said:

> "However advantageous *natural* crevasses may be for drainage purposes to riparian owners, nevertheless they may be closed by the United States in improving the navigation of a stream in the aid of commerce, *and if nothing more is done the resulting damages are consequential.*"

In Jackson's case something more than closing the crevasse in the river bank was done. The bank, before the crevasse occurred in 1859, did not obstruct the high-water flow. It did not extend from 3 to 5 feet above highest known water, as do the completed levees. In times of flood the water went over the bank. It was the overflow of the river's bank which caused the crevasse. Jackson swears, on page 6 of record in Court of Claims, that he profitably culti-

vated this land from 1852 to outbreak of the war without a serious overflow. Up until 1890 there were only two serious overflows—in 1882 and 1884—and then the water went off in time to make good crops.

On page 34 of printed record it is stated—

> "Through the medium of these large and extensive formations the flood waters of the stream have from time immemorial been discharged, passing consecutively from one to the other until they reached the Gulf."

This was true before the practical completion of the levee system and the closing of the Bougere crevasse. With a completed levee line on the west side of the river, from Cape Girardeau, Mo. (Cairo, Ill.), to the Head of the Passes, the water is prevented from escaping into the St. Francis, Tensas and Atchafalaya Basins and reaching the Gulf as formerly.

With a completed levee line on the east bank from Cairo, Ill., to Vicksburg, Miss., and from Baton Rouge, to the Head of the Passes, and the levee line south of Baton Rouge, on the east side, connecting at Baton Rouge with the foothills, which extend from Baton Rouge to Vicksburg, in such close proximity to the river as to serve as levees—the water is prevented from spreading out over the Yazoo Basin and is confined within the adopted artificial channel between the foothills on the east bank and the levee line on the west bank of the river; and from Baton Rouge to the Gulf between the two levee lines on both sides of the river. This shows that something more was done than revetting the bank below high-water mark as in the Bedford's case.

On page 36 of printed record it is stated that the Government has the authority to improve the river by public works resting only *against the banks* of the channel to prevent the same from erosion and preserve its natural identity.

The revetment in the Bedford case was placed *against the bank, below high-water mark.* The improvement in the Jackson case was placed on the bank to a height of 23.4 feet, far removed from the low-water bank.

The United States asserts no title to the Jackson lands. The title in the Jacksons is conceded. This was true in Lynah's case (188 U. S., 462-464).

In Bedford's case the United States denied Bedford's title in the pleadings and claimed it to be in the government.

The Bedford case involved the question of a proprietary right. There is a vast difference between a *proprietary* and *governmental* right which is clearly defined in and recognized by law.

When the government owns property it deals with it as such owner. There can be no implication of intent to pay for what it owns.

Very different from this proprietary right is its governmental right. All private property is held subject to this governmental right. The law of eminent domain underlies all such rights in property. The government can take private property whenever its necessities or exigencies of the occasion demand.

> "The contention that the United States had a paramount right to appropriate this property may be conceded, but the Constitution, in the Fifth Amendment, guarantees that when this

governmental right of appropriation—this asserted paramount right—is exercised, it shall be attended by compensation," etc., etc.

*"Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay."*

(Lynah's case, 188 U. S., 465.)

In Lynah's case, *supra* (pp. 466-7-8) it is stated that Congress has for many terms appropriated money for the improvement of the Savannah river; "that the government knew of the work; *that it had express notice of the damage to the banks along this very plantation; that the works which were being done by the engineers had in view the narrowing of the waterway; that the land would be damaged as the result of the works,"* etc., etc.

These very same facts apply to this Jackson case. They do not apply to Bedford's case. The United States have known since 1890 of the injury to the Jackson lands; have several times recognized notice; have in the annual reports of the Mississippi River Commission recommended some manner of settlement with appellants and others whose lands are similarly affected.

On pages 468 and 480 of Lynah's case, *supra*, it is also stated:

"It appears from the Fifth Finding, as amended, *that a large portion of the land flowed was in its natural condition between the high-water mark and the low-water mark, and was subject to overflow.*" etc.

This is true of the land in this Jackson case. It was subject to overflow before the government under-

took its works, but these previous overflows were not destructive and they "did not materially injure the lands, and they still remained valuable for agricultural purposes," etc.

The real subject of controversy in Lynah's case, *supra*, was one of closing up the drainage to his rice plantation, and increasing the water level in flood tide to about 18 inches, when the water of the river ebbed and flowed twice daily; while in this Jackson case the injury is more permanent and aggravating; and a much stronger case shown by the facts in view of the *actual and permanent invasion* of the land by sand and silt, the washing away of the buildings and improvements, the continuous growth of underbrush and willows, etc., dispossessing the owners and forcing the abandonment of the land, aside from the declarative intent of the government to deliberately flow and place the lands of appellants in the now adopted artificial channel of the river.

**Private Levee Protection.**

XVI.

On page 39 of printed record it is stated that it would seem that it is not impossible for claimants to protect their lands by private levees, etc.

Attention is invited to the first and second paragraphs on page 9 of the Court of Claims' opinion, in pamphlet form, in the Hayward case, No. 26,520. It is there stated by that Court that "we know of no authority in law requiring the owner of submerged lands to embark in any undertaking involving such uncertain results."

The Government contended in that case that Hayward should protect his land from overflow which was occurring twice daily as the tide came in and went out.

The surveys, maps and report of Col. Derby and the Report of 1896 of the River Commission, show that this Jackson land cannot be practically and economically protected. In no event could the owners do it. The claimant and appellant, E. H. Jackson, has testified that he has already exhausted all his means in trying to do it.

Then why do the majority members of that Court say in their opinion that the duty rests upon appellants to protect their lands by private levees when it is conclusively shown, by uncontroverted evidence, that it cannot be practically and economically done even by the Federal Government? And when it is stated in the Hayward case that there is no known authority in law requiring the owners of submerged land to embark upon any undertaking involving such uncertain results? The proposition thus stated by the majority members of the Court of Claims seems to be a contradiction of its position taken in the Hayward case, if not indeed preposterous.

## THE HUGHES CASE.

No. 718.

MARY E. HUGHES, *Appellant*,

vs.

THE UNITED STATES.

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## WIGWAM PLANTATION.

### XVII.

The Wigwam Plantation in this Hughes case is similarly situated to the lands in the Jackson case, No. 720. The facts and law applicable to one applies to the other.

The Wigwam Plantation of Mrs. Hughes is located in that small basin described in Col. Derby's report as being between "Warrenton and Grand Gulf" (Big Black subdistrict) which comprises 15,500 acres of overflowed land, of the value of $121,000, which would cost the government $214,000 to protect by levees. This basin is shown on plate 1, accompanying the Report of the Mississippi River Commission for 1896, at page 3758.

The facts as to levee construction in the Jackson case, on the opposite side of the river, and the foothills on the east side which serve as a levee, are the same as in this Hughes case, so far as the Wigwam Planta-

tion is concerned. The Wigwam Plantation is located between the foothills and the river on the east bank, a short distance south of Vicksburg.

The principles of law applicable to the Jackson case control this branch of the Hughes case. We therefore submit this branch of the Hughes case on the argument made and brief filed in the Jackson case, to which reference is her made.

## THE HUGHES CASE.

No. 719.

THE UNITED STATES, *Appellant,*

vs.

MARY E. HUGHES.

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## TIMBERLAKE PLANTATION.

### Statement of Case.

### XVIII.

Facts I, II, III, IV, V, VI, VII and VIII, as found by the Court of Claims on pages 7, 8, 9, 10 and 11, of the printed record, are the same in this Hughes case as in the Jackson case, except that in the Hughes case the United States built the Huntington Short Line Levee, behind the Timberlake Plantation on the east bank, placing it between the levee and the river being an artificial structure, while in the Jackson case the foothills serve the purpose of levees, and have been adopted as such by long continued use and act of the government. It is a question of fact and not of law.

The Timberlake Plantation prior to 1898 was protected by a levee built by State and local authorities in front of the land, skirting closely the river bank, for its entire frontage. So long as this levee remained

intact the Hughes land was not injured by overflows and was a very valuable cotton and corn plantation, well improved and stocked with tenants, laborers and necessary buildings. It is located adjacent to what was formerly the town of Huntington, afterward washed away and deserted by the inhabitants as a place of residence since the completion of the Huntington Short Line Levee.

About the year 1898 the high waters of the Mississippi river threatened the destruction of the old State levee. The United States then surveyed a location for the Huntington Short Line Levee, which is located 3 or 4 miles back from the river bank, and the old levee, behind the land of appellee, and when built and completed placed the land between the Huntington Short Line levee and the old levee, in the adopted artificial channel of the river. The Huntington Short Line Levee is a continuous levee line joining up with the completed levee system on the same side of the river in that locality.

While the Huntington Short Line Levee was being constructed by the United States, and after being completed, and about the year 1903, a break occurred in the old State levee and the waters of the Mississippi river began to flow onto and over that space of ground between the old State levee and the new Huntington Short Line Levee, where the land is located, and was held and confined on the land between the two lines of levees. The water stood with great pressure against the Huntington Short Line Levee while so confined, which threatened its destruction by the water forcing its way through. Some relief was necessary to save the new levee. The officers

and agents of the United States, with a large force of men, began to dynamite and blow up the old levee so as to relieve the pressure against the Huntington Short Line Levee, in an effort to save it, and finally resulted in saving it. The blowing up of the old State levee, near the lower end of the plantation, gave an outlet for the water thus confined and relieved the pressure against the new levee, but the blowing up of the old levee in front of and at the north end of the plantation caused more volume of water, with increased velocity and destructive force, to flow onto and over the land.

Each year since 1903 the appellee has tried faithfully to cultivate and use her land, but being now subjected to increased flood heights, by being placed between the completed levee system, on both sides of the river, the overflows are now occurring at such frequent intervals and for such duration as to dispossess her of her use, occupation and enjoyment of said land, the buildings and dwellings have become untenantable, the fencing washed away, and land covered with superinduced additions of water, earth, sand and gravel, to a depth of from 3 to 12 feet, the land has grown up with willows, cottonwood, underbrush and weeds, rendering it unfit for cultivation, agricultural purposes as well as all other purposes, causing her to abandon it since the continuous and destructive overflows of 1907, 1908, and 1909, which, as she claims, amounts to a taking of her property by the United States for public use within the meaning of the Fifth Amendment of the Constitution.

It is now a matter of current history, of which the Court will take judicial knowledge, that the Mississippi River in its flood stage of 1912 overflowed and submerged this land for a long period of time.

The controversy over the Timberlake Plantation involves the question of whether or not the placing of the property of appellee by the United States between the completed levee system, on both sides of the river, in the adopted artificial channel of the river, and destroying it, after turning the water onto it by blowing up the old State levee, creates an obligation on the part of the United States of making compensation to her for the value of the land and improvements. We maintain that it does, and that she is entitled to recover.

The object of the Federal Government was to permanently confine the flood waters in a narrower channel between the levees, with increased elevation, veliocity, force, and scouring power to improve and deepen the channel of the river in the interest of navigation, as contemplated by the Eads plan.

By thus placing the land of appellee in the adopted artificial channel of the river was and is an act on the part of the United States declarative of its intention to destroy it.

What constitutes a "taking" has been so thoroughly discussed and covered in the Jackson case (No. 720), counsel for appellee, being the same counsel, now here adopts the brief filed and arguments made in that case and relies on the authorities there cited.

The Court should bear in mind that we are dealing with FLOOD WATERS in these overflow cases. With this distinction kept in mind there should be no difficulty in solving the legal questions involved.

Before the flow of flood waters was interfered with the land of appellee was valuable. Since being con-

fined, in pursuance of the Eads plan, it has been destroyed and abandoned.

### Growing Crops.

### XIX.

In both the Jackson and the Hughes cases the Court of Claims did not seem to take into consideration the question of destruction of growing crops, fences, buildings and other improvements on the land, although they were claimed for on the trial of these cases in that court.

The growing crops, the buildings and the fences are a part of the land, and it is not easily to be understood how the Government could take the land without at the same time taking the growing crops, buildings and fences, which were part of it, as no such distinction has heretofore been made in the jurisprudence.

To the contrary, it seems to be the accepted doctrine that:

> "If growing crops are destroyed by the appropriation of the right of way and entry thereunder, or if they are injured, the owner is entitled to compensation therefor."
>
> American and English Encyclopedia of Law, Vol. 6, page 550.

If there had been an actual entry and appropriation of the lands at the time, and destruction of the crops thereon, the United States would be as much obligated to make compensation for the crops destroyed as for the lands, buildings and fences.

This is a principle which has always been recognized and applied in the construction of levees, and has never been questioned, that if the sovereign, in the exercise of the right of eminent domain, appropriates lands for the construction of levees and thereby injures or destroys growing crops on the lands, the sovereign is as much obligated to make compensation for the crops injured or destroyed as for the lands taken.

Richardson v. Levee Commissioners, 68 Miss., 539.

Such losses have never heretofore been regarded as consequential damages. Now, upon the principle settled in the Pumpelly case, *supra*, the flowing of the lands constitues a taking, as much an actual entry and appropriation, as if there had been a physical ouster.

Upon what principle, then, can it be held that the Government is under an implied obligation to make compensation only for the value of the land and not for the value of the buildings, fences and growing crops injured or destroyed in the taking.

**Laws of Mississippi.**

**XX.**

If the provisions of the Constitution of the State of Mississippi, and the laws enacted in pursuance thereof, have any bearing whatever upon the liability of the Federal Government in levee construction, we desire to refer the Court to the following provisions:

Section 11 of the Act of the State Legislature, approved February 28, 1884, provides:

> "That for the purpose of constructing, maintaining and repairing levees, of protecting the river bank against caving, and of improving the channel of the Mississippi river, full jurisdiction of the soil of said levee district is hereby granted to the United States, with full power and authority to take, use and appropriate so much and such parts thereof as may be necessary for said purposes that may be situated in said levee district; *Provided, always,* that under an act of Congress already, or that shall be, passed, the due compensation to be first paid, secured to the citizens of this State by the Constitution, when private property is *taken* for public use, *shall be secured to the citizens and property owners of this State,* or if no such act of Congress, then said Uniied States Government may appropriate such property under the law and in the manner as provided for in Section 4 of this act."

It will be here observed that the State Legislature *reserved* to the citizen the right to demand just compensation of the Federal Government in case of a *taking* of his property.

**Constitutional Provision.**

XXI

Sec. 238 of the Mississippi Constitution, 1890 provides:

> "No property situated between the levee and the Mississippi River shall be taxed for levee

purposes, nor shall *damage* be paid to any owner of land so situated because of its being outside a levee."

It will be observed that the only claim sought to be barred by this constitutional provision is one for *damage*. There are provisions in nearly all State Constitutions providing against *damage* or a *taking*. These two distinctions have always been recognized in law. The above constitutional provision only applies to claims for *damage*, not one of *taking*.

These cases are instituted to recover for a *taking*, not *damage*. There is no provision in the Constitution of the United States providing for payment in case of *damage*.

Ham v. Lee Com'rs., 83 Miss., 558.

**Assessed Damage.**

XXII.

This is not a proceeding to recover the value of the space of ground on which the levee stands, as covered by the Court's opinion in the Overton case (45 Ct. Cls., p. 17), a Louisiana case, nor for damage to drainage. The Overton case is controlled by an express provision of the Louisiana State Constitution, not found in the Mississippi State Constitution. This space was paid for by the local levee board. What we complain of is the fact that the United States took possession of the space of ground paid for by the Levee Board and built thereon the Huntington Short Line Levee, which resulted in destroying our land.

**Conclusion.**

## XXIII.

It is respectfully submitted that the Bedford case has no application whatever to either of these cases.

Upon final hearing in this court we respectfully submit:

*1.* That the judgment of the Court of Claims in the Jackson case No. 720 should be reversed and judgment entered for the appellants.

*2.* That the judgment of the Court of Claims in the Hughes case, No. 718, should be reversed and judgment entered for the value of the Wigwam Plantation in favor of the appellent.

*3.* That the judgment of the Court of Claims in the Hughes case, No. 719, should be affirmed.

*4.* And that in addition to the above the Court of Claims should be directed to ascertain the value of the improvements, rents and crop losses in each of the respective cases claimed in the petitions, and as proven by the evidence, and enter judgment accordingly.

Respectfully submitted,

WAITMAN H. CONAWAY,
*Attorney for* MATTIE W. JACKSON, *widow*, WILLIAM GRAHAM JACKSON *and* GLADYS L. JACKSON, *infants, and* ERNEST H. JACKSON, *Appellants in No. 720;*
MARY E. HUGHES, *Appellant in No. 718;*
MARY E. HUGHES, *Appellee in No. 719.*

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

## No. 720.

MATTIE W. JACKSON, WIDOW; WILLIAM GRAHAM JACKSON AND GLADYS L. JACKSON, INFANTS, BY MATTIE W. JACKSON, THEIR NEXT FRIEND, AND ERNEST H. JACKSON, APPELLANTS,

*vs.*

THE UNITED STATES.

## No. 718.

MARY E. HUGHES, APPELLANT,

*vs.*

THE UNITED STATES.

## No. 719.

THE UNITED STATES, APPELLANT,

*vs.*

MARY E. HUGHES.

APPEALS FROM THE COURT OF CLAIMS.

**REPLY BRIEF OF COUNSEL FOR APPELLANTS IN CASE NO. 720, FOR APPELLANT IN NO. 718, AND FOR APPELLEE IN NO. 719.**

**Answer to Argument of the United States.**

In the brief filed on behalf of the United States there are three reasons urged as to why the judgment of the Court

of Claims dismissing the petition in the Jackson case, also the petition as to the Wigwam Plantation in the Hughes case, should be affirmed. They will be found on page two (2) of that brief.

The first proposition is:

> "(1) The damage or destruction was occasioned by the levee system as a whole, and was not a taking by the United States, because parties other than the United States contributed largely to the construction of the levee system."

This first contention is fully answered in the original brief filed on behalf of appellants on page twenty-five (25) under the caption entitled "Joint Liability," and on page twenty-six (26) under the caption entitled "Liability of the United States," and needs no further argument.

Finding XVI (R., 30) states that the United States practically closed the natural outlets into the Tensas basin, which extends for many miles above and below the Jackson lands on the opposite side of the river, the local authorities performing but *very little* of the work.

Finding XVII (R., 30) states that the United States alone closed the Bougere crevasse opposite the Jackson lands, which ultimately caused their destruction.

Finding XI (R., 27) shows "permanent control" of the levee system by the United States.

Finding XV (R., 28) shows the "ADOPTION" and "USE" *by the United States of the levees built by State and local authorities.*

The *permanent control* of the *levee system* and the *adoption* and *use* of the levees built by State and local authorities by the United States has been judicially determined by the Court of Claims in the Overton case, 45 Ct. Cls., 17.

None of the States bordering on the Mississippi River ever had *a levee system*. The United States was the *first* and the *only party* to adopt *a levee system*, and that is called the Ead's plan.

These facts, we maintain, cast the duty and obligation on the United States of making just compensation to claimants for the value of their property destroyed by the construction of *that levee system*. It was not the building of one levee that caused the destruction of the Jackson land, but the *construction* and *completion of the levee system* by the United States, to improve the river for navigation and which was authorized by Congress in 1906 (34 St. L., 208), which caused said lands to be actually invaded with superinduced additions of water, sand, and gravel, thereby destroying them for all agricultural purposes, as stated in Fact Six (R., 25), Fact Eleven (R., 27), and Fact Eighteen (R., 30).

THE SECOND PROPOSITION IS:

> "(2) It is not proven that the lands of appellants have been placed in the adopted artificial channel of the Mississippi River, and thereby taken for public purposes."

Counsel for appellants respectfully submit that they do not know of any way in which the United States could adopt the foothills to serve the purpose of levees *except by continuous use* for a great length of time. How else could the United States adopt these foothills as levees? The act of Congress of 1906 (34 St. L., 208) authorized the extension of the levee system from Cape Girardeau to the Head of the Passes, and this could not be done without the adoption and *use* of the foothills to which the levees have been connected, in the Homochitto District making one *continuous line of obstruction*, retarding and checking the free flow of the waters on their way to the Gulf.

In 1890 the Committee on Commerce of the United States Senate began an inquiry into the object and effect of *the levee system adopted by the United States*. Major B. M. Harrod was then a member of the Mississippi River Commission. In his testimony under oath before that committee, given on May 13, in speaking of the Homochitto Levee

District, wherein the Jackson lands are located, he in part says:

> "Senator WASHBURN: Can you tell us just the plan from Red River down? Is it leveed all the way on both sides of the river? Is that the proposition of the Commission?
>
> "Major HERROD: It is leveed on one side, the right bank, the entire way. It is leveed on the other bank from Baton Rouge down. The levees do not extend above that point because the hills are in such close proximity as to serve as levees."
>
> (See Report Senate Committee on Commerce, United States Senate, May 12, 1890, p. 69.)

Again, on page 213 of same report, Smith S. Leach, Captain of Engineers, U. S. Army, in answer to question by Senator Chandler, in part says:

> "Is it your idea that levees costing in the future $2,000,000 will effectually prevent the Mississippi from overflowing along any part of the overflow regions?
>
> "Ans. They will prevent the river from overflowing at any point where an overflow would cause a *material loss of water from the channel.* The Government has never consented to contribute one cent towards the building of a levee that did not *materially restrict the flood escape.* There are certain small basins, footings, as they may be called, of the overflowed country near the high bluffs that contain but a small area; and we can afford to let each flood fill them once. *The damage caused by allowing each flood to fill a basin once is less than the cost of leveeing it.*" (Italics ours.)

It is in one of these small basins that the Jackson lands are located, between Ellis Cliff and Fort Adams, and it is cheaper to use the foothills as a levee to confine the flood waters than it is to construct a levee as stated in the Fifth Finding (R., 23).

Finding V also states, quoting from the River Commission's report, as follows:

> "Their area (referring to the small basins) is so small that it can hardly be contended that their leveeing is important to the improvement of the navigation of the river."

The answer of Captain Leach, above quoted, explains why the building of levees fronting these small basins is not important to the improvement of the river for navigation, and that is that the building of such levees would not "restrict the flood escape," for the reason that the "foothills are in such close proximity as to serve as levees," and by connecting the levees with the foothills there is no material "loss of water to the channel," as stated by Major Herrod and Captain Leach in the answers above quoted—in other words, the waters strike the foothills the same as they would strike a levee, and the levee line, being connected with the foothills at Baton Rouge, as shown by the map of the alluvial valley of the Mississippi River filed with the War Department's report on March 6, 1911, cause the waters to return to and flow on down the channel of the river to the Gulf. In this way all the waters of the river are preserved for navigation.

Said Finding V further states that:

> "In the Homochitto Levee District (in this district the Jackson lands are located) from Vicksburg to Baton Rouge, on the east side of the river, the foothills are so located as to serve, and do serve, the purpose of a levee line in said district, in times of high water, and the Government has not constructed any levees in that district."

It is at the lower end of this district where the Government has connected the levee line with the foothills on the east bank referred to above, and in this way the Jackson lands have, by the connecting of the levee line with the foothills, preventing the escape of the waters, been placed in the "adopted artificial channel" of the river.

If, as contended by counsel for the United States (pp. 9-10 of brief), levees "established according to law" form the banks of the river, on the east side, at and below where the levees connect with the foothills, land between those levees and the levees on the west bank would be in the adopted artificial channel of the river, why would not land located just above the point where the levees connect with the foothills, and located between the foothills and the levees on the west bank, be also in the "adopted artificial channel" of the river? There is only an imaginary line between the two pieces of land, and that imaginary line is where the levee has been connected with the foothills by the Government.

In this connection the court's attention is invited to the fact that the Government has caused these small basins in the Homochitto Levee District to be surveyed three times and an investigation made as to the value of the land in said basins and the cost of constructing levees instead of using the foothills for levees. The first survey was made in 1895, the second in 1910, and the third in 1912, and each time the same report has been made, namely, THAT IT WOULD COST MORE TO BUILD THE LEVEES THAN THE VALUE OF THE LAND IN THESE BASINS.

The last survey and report was made in compliance with an act of Congress approved July 15, 1912 (37 Stat. L., 201, 218), and was reported to Congress by the Secretary of War on December 2, 1912, and published as House Representatives' Document No. 1010, 62d Congress, 3d session.

The Jackson lands are located in that small basin between Ellis Cliff and Fort Adams, and referring to that basin said report states:

> "That the benefits to be derived from the construction of a levee are relatively small as compared with the cost, and the work cannot be recommended" (par. 59, p. 7, said Document No. 1010).

Referring to the small basins, in one of which the Jackson lands are located, in Homochitto Levee District, said report further states:

> "The land embraced in these basins is in places covered with willow and material that would be valuable for use in the work of river improvement and in such cases it is desirable that the ownership should be in the United States. In fact, the earlier reports of the Commission recommended that such lands be acquired for that purpose" (par. 84, p. 12, said Document No. 1010).

Finding VI (R., 25) states that:

> "The effect of the frequent and successive overflows in the years 1906, 1907, 1908 (for 129 days), and 1909 was to drive away the tenants, cover 1,700 acres thereof with sand and silt deposits from six inches to six feet in depth; said land has grown up with weeds, young willows and cottonwood from 6 to 15 feet in height; many of the buildings, houses and cabins formerly on said land have been lifted from their foundations and washed into the fields, the fencing on said land washed away and torn to pieces by the swift currents of the water running over said land; and that said lands have been destroyed for agricultural purposes and have no market value."

Finding XIII (R., 28) states that:

> "Before the joining of the levee line by the United States in accordance with the Ead's plan, thus making the same continuous, there were occasional overflows of the claimants' lands, but they have been made deeper, *more frequent and more forceful by the adoption and completion of the levee system.* However, these overflows, *before the adoption of* said system, did not materially damage said land and it remained still *valuable for agricultural purposes.*"

On page five (5) of the Government's brief it is stated that in order to show that the Jackson lands have been

placed in the adopted artificial bed of the river it must be established that the Government has adopted the foothills, and the court below says, "to sustain this contention the court must indulge an inference from the general plan of the public work," and this notwithstanding the fact that it is stated in Fact V (R., 23) that in the Homochitto Levee District "the foothills are so located as to serve, and do serve, the purposes of a levee line" (R., 23).

If the foothills serve the purposes of a levee the water must cover all lands between the foothills and the levee line on the opposite side of the river just the same as the water covers all land between the levee line which connects with said foothills below and the levee line on the west side of the river. Therefore, lands located between the foothills on the east bank, to which the levees have been joined and which serve as levees, and levees on the west bank, are as much in the adopted artificial channel of the river as lands located between levees constructed on both sides of the river.

The general plan of the work of improving the Mississippi River for navigation is the construction of a line of levees on either side of the river from Cairo to the Head of the Passes authorized by Congress in 1906 (34 Stat. L., p. 208). The purpose of the levees is to confine the waters which *could not be done without connecting the levee lines with the foothills below the Jackson lands.* It would therefore seem, from the general plan of the work, that the connecting of the levees with the foothills necessarily adopted the lands located between the foothills on the east bank and the levees on the west bank as being in the artificial channel of the river. If, as the court below says, in Finding V (R., 23), said foothills serve the purpose of a levee, then the lands of Jackson are now located in the adopted artificial channel of the river. The connecting of the levee line below the Jackson lands with the foothills makes a continuous levee line on the east bank in the Homochitto Levee District and said foothills and levee serve the same purpose,

which cause the *more frequent and forceful overflow* of the Jackson lands to the extent that they have been destroyed for all agricultural purposes as stated in Finding VI (R. 25), Finding XI (R., 27), and Finding XVIII (R., 30).

**No Consequential Injury or Damage Found by the Court Below.**

On page two (2) of the Government's brief it is stated that—

> "The injury to appellants' lands is consequential damage for which they cannot recover."

The findings of fact do not state that the injury or damage done to the Jackson lands is consequential. The findings to the contrary state an absolute destruction of the lands *as a result of the levee system.*

The Government relies upon the decision in the Bedford case (192 U. S., 217) to defeat these cases. The court in the Bedford case expressly found that "the injury done to the claimant's land was an effect of natural causes; the injury caused by the Government was by interrupting the further progress of natural causes, that is, the further change in the course of the river, and is also conjectural" (Bedford *vs.* U. S., 36 Ct. Cls., 474, 477; Finding VII).

In addition to this, in Bedford's case the sixth finding of fact simply states a *damage* done to the claimant's land, while the findings in the Jackson and Hughes cases state an absolute destruction of the lands (*Ib.*, 476).

If the doctrine contended for by the Government attorney is sound, and the destruction of the Jackson lands is a consequential damage as a result of the levee system constructed by the Government, then the defendant may, in the exercise of its governmental powers, destroy the property of any citizen and the citizen be without redress. Such a doctrine is contrary to the spirit of our laws and in con-

flict with the intendment of the Fifth Amendment to the Federal Constitution.

## II.

### The Bougere Levee Obstructs the High-Water Flow.

The third contention made by the Government attorney on page two (2) of his brief is that the Government had the right to construct the Bougere levee to a height ABOVE HIGH-WATER MARK and undertakes to compare the levee with the revetment work placed against the bank, BELOW HIGH-WATER MARK, in the Bedford case.

The fourth finding of fact in Bedford's case states—

> "The revetment consisted of willow mattresses weighted down by stone, and were placed on said bank BELOW HIGH-WATER MARK" (36 Ct. Cls., 476).

Revetment placed *below high-water mark* did not obstruct the high-water flow as did the Bougere levee, which was built to a height of 23.4 feet (R., p. 30), or to a height of from *three to five feet above the highest known waters* (R., p. 29).

The Bedford case again differs from the Jackson case in this, that the Bedford revetment did not deflect or obstruct either the low or the high water flow, while the Bougere levee was built for the purpose of obstructing and deflecting and does obstruct and deflect the high-water flow to the extent of *increasing* the flood stage of water on the Jackson land four feet (R., p. 30). The findings of fact in the Bedford case state that "the cause of the deflection of the river was the cut-off," * * * and that "the revetment did not change the course of the river" (36 Ct. Cls., 477, Fact VII).

### Permanent Flowing Not Necessary to Constitute a Taking.

We submit that the law is well settled to the effect that it is not necessary that the overflow be continuous and permanent to constitute a taking of the lands and crops. It

is sufficient if, in times of high water, the overflow occur at intervals of a few years or during cropping season, should they be of such a damaging character as to disturb riparian land-owners in the profitable use, possession, and enjoyment of their property.

U. S. *vs.* Cora Welsh, 217 U. S., 333.
McKenzie *vs.* Miss. & R. R. B. Co., 29 Minn., 288, 293-'4.
Weaver *vs.* Miss. & R. R. B. Co., 28 Minn., 534.
G. R. B. Co. *vs.* Jarvis, 30 Mich., 308.
Eaton *vs.* B. C. & M. Co., 51 N. H., 504.
U. S. *vs.* Sewell, 217 U. S., 611.

In Sewell's case, *supra,* the court's findings of fact, at page 9 of the Record in Supreme Court, says:

> "It appears further from the evidence that there is every year what is termed a June rise in the Kentucky River, which sometimes comes earlier than June and sometimes later, but always during cropping season, and that during that period of time there are freshets in the creek."

As to their effect, the court, at page 9 of said Record, says:

> "I think the evidence makes out that the effect of this rise and these freshets in connection with the pool that regularly stands back of the dam, which to the extent hereinbefore stated permanently overflows the land in question, will be to cause the rest of the creek land to be regularly overflowed each year to such an extent as to prevent cultivation thereof."

And it is further said by the court, page 9 of said Record:

> "This, then, being the case, it follows that this portion of the creek bottom land is also permanently affected by the dam so as not to be capable of successful cultivation. Water does not stand over or through it all the time, as in case of the twenty acres

hereinbefore referred to. Indeed, it is upon it only for a very short time. But it is a reasonable conclusion that it will be over it every year, and that at a time when it will destroy any crop that may be planted thereon. It is so certain that such will be the case as to deter any reasonable person from attempting to crop it. This injury thereto may, therefore, be said to be a permanent one, though its permanency is not of the same character as that of the twenty acres."

The court below (affirmed by this court), when announcing the conclusion that this is a "taking," at page 9 of Record, says:

> "I hold then that the effect of the construction of the dam is to take from plaintiff forty acres of valuable land," etc.
>
> Broadwell *vs.* Kansas City, 75 Mo., 213.
> Payne *vs.* Kansas City, 112 Mo., 6.
> Pearsall *vs.* Supervisors of Eaton Co., 74 Mich., 558.
> Mills on Eminent Domain, sec. 30.
> Cooley on Con. Lim., 5th ed., p. 671.

**Effect of Closing Outlets.**

The closing of natural outlets for the flow of water, so as to raise the water above its natural level, resulting in the overflow of riparian lands, constitutes a taking for which compensation must be made.

Troe *vs.* Larson, 84 Va., 649.
Hebron G. R. Co. *vs.* Harvey, 90 Ind., 192.
Little *vs.* Standback, 63 N. C., 285.
Rankin *vs.* Harrisburg, 104 Va., 524.
Roberts *vs.* Rust, 104 Wis., 619.
Barden *vs.* City of Portage, 79 Wis., 126.

**Something Has Occurred to Destroy Jackson Lands Since the Year of 1890.**

We are clearly within the record in the Jackson case when we assert that prior to 1890 Adams county, Mississippi, in and around Natchez and vicinity, where the Jackson lands are located, was noted for cotton raising. The land-owners owning plantations and living in that locality lying between the river and the highlands east of it, between Vicksburg and Baton Rouge, were able to and did profitably cultivate them. If this were not true their plantations would not have been in a high state of cultivation prior to 1890, well stocked with tenants and laborers, houses, and ginneries, which no one denies. The owners were prosperous and their lands yielded large earnings. The Jackson plantations have been known as very valuable cotton lands for a great number of years.

Something has occurred since 1890 to take their homes from them and compel the abandonment of their lands. Twenty-one thousand souls have been rendered homeless. The country is devastated. Labor is gone, dwellings and other outbuildings washed away, sand deposited in great sheets and to a great depth all over the lands. What was formerly a prosperous cotton-raising plantation and community has become a wilderness and barren waste. These conditions did not exist prior to 1890. The land-owners since 1890 have impoverished themselves by striving with their industry and means against the frequency of destructive overflows, hoping they could hold their property. They now have no more money with which to contend against such conditions after twenty years of effort and sad experience, and have abandoned their homes and lands. Their lands are destroyed for the purposes for which they were used and adapted—cotton raising.

With these conditions before it the Mississippi River Com-

mission in its report for 1910 (pp. 2937-9, referred to in Finding V), in part says:

> **"Some of the land-owners in these areas have brought suits for damages in the Court of Claims, which, though pending for many years, have as yet been unavailing. * * ***
>
> **"Meanwhile the litigation drags its slow length along, the lives of the land-owners are passing away and hope deferred is making their hearts sick. The situation is pathetic and distressing in the highest degree. That these people should be condemned to perpetual inundation without possibility of relief or redress, for the sake of an improvement from which their fellow-citizens are enjoying great benefits, is intolerable to any man's sense of justice."**

Before the Mississippi River Commission made its report of 1910, referred to in Finding V, the Legislature of the State of Mississippi adopted a joint resolution as follows:

**"Memorial of Mississippi State Legislature to Congress.**

"Mississippi State Legislature, Senate Joint Resolution No. 14.

"A joint resolution memorializing the Congress of the United States to pass necessary laws to enable riparian land owners along the Mississippi River in the counties of Warren, Claiborne, Jefferson, Adams, and Wilkinson, in the State of Mississippi, to secure compensation for the annual inundation and destruction for agricultural purposes of their lands, owing to the construction of Government work and levees on the west bank of said river, and to provide adequate protection for said lands.

"WHEREAS, There are in the county of Warren twenty-one thousand acres of arable land capable of producing 15,000 bales of cotton annually; and in the county of Claiborne ten thousand acres of arable land

capable of producing 7,500 bales of cotton annually, and in the county of Jefferson eighteen thousand acres of arable land capable of producing 13,000 bales of cotton annually, and in the county of Adams twelve thousand acres of arable land capable of producing 9,000 bales of cotton annually, and in the county of Wilkinson nine thousand acres of arable land capable of producing 7,000 bales of cotton annually, and,

"WHEREAS, These lands front upon the Mississippi River and are unprotected by levees, and,

"WHEREAS, Until recent years these lands were capable of being thoroughly cultivated and utilized for agricultural purposes and were of considerable value to their respective owners and yielded large returns to the counties in which they are located, and to the State of Mississippi, by reason of their assessed valuation upon the tax rolls of said counties and State, and,

"WHEREAS, In recent years said lands have been repeatedly inundated and their crops destroyed at least once annually by the inundation of the Mississippi River, and,

"WHEREAS, **This result is entirely due to the construction of levees and Government works upon the western bank of the Mississippi River** in the States of Louisiana and Arkansas, which said fact was admitted in the report of the Mississippi River Commission, dated June 29, 1894, in which it is stated:

" 'The fact is recognized by the Commission that it is the inevitable result of the progressive advance of the Mississippi River levee system, to cast an additional burden upon riparian lands in the lower portions of the valley subject to overflow, not included within the protection of the levees, and that such a case presents all the elements of an equitable claim for compensation by the Government by or under whose authority the work was constructed.'

"The correctness of which conclusion has been fully demonstrated by the occurrence since the date of said report, in that **said lands are now inundated so often, and to such an extent, as to be practically valueless to the owners for agricultural or pasture**

purposes, and their tax value consequently so decreased as to yield but scant revenue to the State or the counties. *Which said condition must inevitably continue to grow worse as the levee system upon the Mississippi River is perfected and made more adequate,* and,

"WHEREAS, Under the law, as it now exists, said riparian owners are without legal redress against the Government of the United States, and,

"WHEREAS, It is but right and just that they should receive adequate compensation for the damage inflicted upon them; therefore be it

*"Resolved,* By the Legislature of the State of Mississippi, That the Congress of the United States is memorialized and requested to enact such law or laws as will grant to the owners of riparian lands in said counties of Warren, Claiborne, Jefferson, Adams, and Wilkinson a right of redress against the Government of the United States for the injury which they may be able to prove they have sustained by reason of the construction by the Government of the Mississippi River levee system.

*"Be it Further Resolved,* That the Congress of the United States is memorialized and respectfully requested to make further appropriations so as to enable the building of levees in the counties hereinbefore mentioned, commonly known as the Vicksburg Levee District.

*"Resolved further,* That the members of Congress of the State of Mississippi are requested and urged to make special efforts to carry into effect the purposes of this memorial.

"Adopted by the Senate February 4, 1910.

"LUTHER MANSHIP,
*"President of Senate.*

"Adopted by House of Representatives February 15, 1910.

"H. M. STREET,
*"Speaker House of Representatives.*

"Approved by the Governor February 15, 1910.

"E. F. NOEL, *Governor.*"

(Black letter ours.)

(See Laws of Mississippi, 1910, p. 309, chap. 363.)

These claimants, in one way or another, have been before Congress for more than 18 years and no practical attention producing relief has been given to their humble petition, or to the recommendations of the River Commission, and they have at last, after having been subjected to irreparable and permanent injuries, and the market value of their property destroyed, and they ousted therefrom, been able to seek relief in this court, and are met with the argument that they can be allowed compensation only for the value of the naked lands, and not for the value of the crops which were growing on the lands at the time of the taking, nor for the use and occupation, nor for the injuries done while the compensation was withheld, and they were being physically ousted by the recurring flowings.

**Land Values Stated in Petitions and as Fixed by the Court of Claims.**

Reference is made on page two (2) of the Government's brief and in the dissenting opinion of the court below (R., 44) that the land involved on the questions raised in these cases amounts to "probably not over $7,000,000." According to the report of the Attorney General, 1912 (p. 219), there are 123 cases pending in the Court of Claims as the result of the improvement of the Mississippi River, and it is stated in said report (same page) that "three cases [these cases] now pending in the Supreme Court (Nos. 718, 719, and 720) will probably determine all, or at least all, of the principal issues in about ninety cases now on the docket of the Court of Claims." The $7,000,000 referred to by Government's counsel and Mr. Justice Howry in his dissenting opinion is the aggregate amount claimed in petitions filed in the 123 cases now pending in the Court of Claims, and only ninety may probably follow the Jackson and Hughes cases.

It will be noted that the petition in the Jackson case fixes the value of the land at $300,000 (R., 16), and that the Court of Claims in Findings III and IV (R., 21-22) fixes the value of the Jackson lands at $128,000 in round numbers, or 128/300 of the amount claimed in the Jackson petition. If the same rate of proportion should be followed in the rest of the cases now pending in the Court of Claims the court would fix the value of the lands involved in all cases at 128/300 of the said $7,000,000, or $3,386,624. It would therefore seem that there was no reason for the Government attorney, or the court below, to be frightened on account of the question of "immeasurable responsibility" and the large amounts involved.

**Conclusion.**

If humble counsel may be pardoned, there is no more cruel or wanton act recorded in the history of the civilized world.

When the Norman King created the New Forest, he had at least the excuse that he needed the chase for the diversion of himself and his friends, and that the land was his by right of conquest.

When the French Monarch ordered the devastation of the Palatinate, he had the justification that it was necessary for the protection of his own dominion.

When General Sherman, in his march through Georgia and South Carolina, left nothing standing but the blackened chimneys, he had at least the excuse "that war was hell," and that such acts were necessary to terminate the war, and to spare the lives of thousands of men, and the expenditure of millions of money, to save the Union.

But these acts complained of were done by the officers and agents of the United States, knowing that they would result in the destruction of lands and homes (and for 16 years they have recommended settlement), in a time of profound peace, and against a people who were supposed to

be protected by the provisions of the Constitution of the United States, and who for nearly twenty years have prayed for relief, or compensation, and so far without avail.

Your honorable court cannot, of course, compensate them for the privations and anxiety and mental distress to which many of them have been subjected during the prolonged and gradual destruction of their properties, but, certainly, this court can award compensation for the pecuniary losses which come within the definition of the taking of private property for public use.

If your honorable court, under the circumstances, is powerless to render a full, just, complete, and adequate compensation, then the despotisms of Rome, and of Spain, and of France were merciful, the sages of the law have been all wrong, the brave words of Mr. Justice Miller (Pumpelly's case, 13 Wall., 166) and of Mr. Justice Brewer (Lynah's case, 188 U. S., 445), Mr. Justice Holmes (Welch's case, 217 U. S., 333), and Mr. Justice Lurton (Grizzard's case, 219 U. S., 180) are but tinkling cymbals and sounding brass, and the United States stands forth as the most dangerous destroyer of private property of its citizens in the civilized world.

It is therefore respectfully submitted that the judgment of the court below dismissing the Jackson petition and the petition in the Hughes case as to the Wigwam plantation should be reversed, and that the judgment of the court below in the Hughes case for the value of the Timberlake plantation should be affirmed.

HOLMES CONRAD AND
WAITMAN H. CONAWAY,
*Attorneys for Appellants in Nos.* 720 *and* 718
*and Attorneys for Appellee in Case No.* 719.

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## TABLE OF CASES CITED.

# In the Supreme Court of the United States.

OCTOBER TERM, 1912.

MATTIE W. JACKSON, WIDOW; WILLIAM Graham Jackson and Gladys L. Jackson, infants, by Mattie W. Jackson, their next friend, and Ernest H. Jackson, appellants,
*v.*
THE UNITED STATES. } No. 720.

MARY E. HUGHES, APPELLANT,
*v.*
THE UNITED STATES. } No. 718.

THE UNITED STATES, APPELLANT,
*v.*
MARY E. HUGHES. } No. 719.

*APPEAL FROM THE COURT OF CLAIMS.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE JACKSON CASE.

The essential facts regarding the alluvial valley of the Mississippi River prior to levee construction, the work which the United States has done, and the levee system which now exists, are set forth at pages 2 to

10, inclusive, of the brief for appellant with sufficient clearness and accuracy to make a repetition of them unnecessary, and reference is hereby made to that brief of those facts. For a condensed statement of the case, reference is also made to the opinion of the court below. (R., p. 31.)

These cases are in the nature of test cases, and, as stated in the dissenting opinion in the court below (R., p. 44), there are over a hundred farms situated as are the lands involved here, worth probably over $7,000,000.

## ARGUMENT.

The decision of the Court of Claims dismissing the petition should be affirmed for any or all of the following reasons:

(1) The damage or destruction was occasioned by the levee system as a whole, and was not a taking by the United States, because parties other than the United States contributed largely to the construction of the levee system; or

(2) It is not proven that the lands of appellants have been placed in the adopted artificial channel of the Mississippi River, and thereby taken for public purposes; and

(3) The closing of the Bougere Crevasse and the consequent increase in the flood heights on appellants' lands was an act in preservation of the natural bed of the river in aid of navigation, which the United States had the right to do.

The injury to appellants' lands was, therefore, consequential damage for which they can not recover.

**The levee system is not the work of the United States alone.**

That the damage or destruction of appellants' lands was occasioned by the levee system as a whole, is found by the court below in Finding XI. (R., p. 27.)

In *Lynah* v. *United States* (188 U. S., 445), and in fact in all cases which have reached this court upon appeal and all cases which have reached a final trial in the Court of Claims, the findings of fact show that the improvement which resulted in the destruction and therefore the taking of land was solely the act of the United States. In the case at bar it is found as a fact, by the court below, that the destruction of appellants' lands was caused by the flood waters of the Mississippi being confined within the levee lines from Cairo, Ill., to a point near the Head of the Passes, far below said lands, and that these levee lines have been constructed in part by the United States and in part by the local authorities of the States bordering on the river. (Findings X and XI, R., pp. 26, 27.) The levee line is composed of sections built wholly by the United States, partly by the United States and partly by local authorities, and wholly by local authorities. When the flood waters of the river passing Cairo are of such volume that the low-water channel will not contain them they would, in the absence of levees, enter and flow through the St. Francis Basin in Missouri and Arkansas, the head of which is near Cairo, Ill., and would continue to flow in that basin to its foot near Helena, Ark. The flood waters would then cross the low-water channel of the river and enter and

flow in the Yazoo Basin in northern Mississippi, and southward through that basin to its foot near Vicksburg. The flood waters would then again cross the low-water channel of the river and enter and flow southward in the Tensas and Atchafalaya Basins in Louisiana, and through those basins and their drainage into the Gulf of Mexico without reentering the low-water channel.

Appellants' lands are located almost opposite the lower end of the Tensas Basin. The levee system prevents the flood waters from entering any of the basins, above described, and from escaping through the Atchafalaya Basin into the Gulf of Mexico. If the sections of levee in that system, constructed wholly by the local authorities, were removed, the flood heights on the appellants' lands would be reduced, the lands would not be overflowed as frequently, and in fact the lands would not have been destroyed, for the reason that the flood waters would escape through the gaps in the levee system, and would run off through the Atchafalaya Basin into the Gulf. It follows, therefore, that the works constructed wholly by the United States or the works constructed partly by the United States, if standing alone or together, would not destroy appellants' lands. How, then, can these lands be said to have been taken *by the United States* under the fifth amendment of the Constitution if their works, standing alone, would not cause such taking?

The implied contract on the part of the General Government to pay for private property taken for

public purposes is always based upon a taking *by the General Government*. In Lynah's case, *supra*, Mr. Justice Brewer delivering the opinion of the court and referring to the question of jurisdiction, said:

> There have been many cases in which a distinction has been drawn between the taking of property for public uses and a consequential injury to such property by reason of some public work. In one class the law implies a contract, a promise to pay for the property taken, which, *if the taking was by the General Government*, will uphold an action in the Court of Claims; while in the other class there is simply a tortious act doing injury over which the Court of Claims has no jurisdiction. (188 U. S., 445, 472.) (Italics ours.)

It will be noted that Mr. Justice Brewer predicates his statement that an action might be upheld in the Court of Claims upon the "*taking by the General Government.*" A taking by the General Government in conjunction with some other power is not such a "taking by the General Government." Nor can there be a "taking by the General Government" when its works, standing alone, would not cause a taking at all.

**(2) The taking of the lands not proven.**

In order to show that the lands have been placed in the adopted artificial bed of the river it must be established that the Government has adopted the foothills back of them as the levee line. The court

below has said that to sustain this contention it must indulge an inference. (R., p. 36.) The fact is not proven in the record nor found by the court in its findings of fact. The Mississippi River Commission must know whether this is a fact or not, and in its report for 1894, quoted in Finding V of the Court of Claims at pages 22 and 23 of the record, the commission says:

> It is *alleged* that the omission of the United States to construct levees along the front of the land of petitioners constituted an adoption of the bluff behind the lands for the purpose of the levees.
>
> * * * * *

The commission does not say that it has so adopted the foothills, but contents itself with the statement that it is so *alleged* by appellants. The commission then says further that in 1895 and 1896 the cost of building levees within the Homochitto Basin was greater than the value of the land which the levees would protect; but in making this observation the commission was outside of its jurisdiction.

The act under which the commission existed and was operating provided:

> That no portion of the sum hereby appropriated shall be used in the repair or construction of levees for the purpose of preventing injury to lands by overflow, or for any other purpose whatever except a means of deepening or improving the channel of said river. (21 Stats., 474.)

The duty of the commission was the improvement of navigation and not the reclamation of land, and they do not say that in the improvement of navigation they have adopted the foothills in the place of levees. And the duty and purpose of the commission being the improvement of navigation by the erection of levees to make the channel narrower and thus deepen it by the scouring force of the current, with an express prohibition against any expenditure to reclaim or protect land, the very fact that they caused a survey of this district to be made in 1895 and 1896 (Finding V, R., p. 23) shows that they had not at that time adopted the foothills as a line of levee. If they had made such adoption, then the money expended in this survey was spent in direct contravention of the express prohibition of the acts of Congress under which the commission operated, for the sole purpose of such a survey must then have been the reclamation or protection of this land, which purpose they were prohibited from carrying out.

Nor, as the court below aptly points out in its opinion (R., p. 36), is it reasonable to believe or to hold without positive proof to that effect, that this commission in the carrying out of a plan the essential feature of which was the confining of the waters of the Mississippi within a narrow channel and thereby increasing the velocity of that water and scouring and deepening that channel (Finding X, R., p. 26) would, for a distance of 234 miles out of a total of 1,050 miles, adopt as one bank of a "narrower" channel foothills which are from 2 to 6 miles from

the river (R., p. 22). The mere statement of the proposition shows that adoption of such a plan would have defeated the principal feature of the plan itself and the very object for which the commission was created. There would be no scouring power to a current 6 miles wide, and the washing of the land between the foothills and the river by the flood waters would tend to fill up rather than deepen the navigable channel.

Further, if such adoption were a fact, why is it not shown clearly and conclusively instead of being rested upon "indistinct and recommendatory reports," particularly when the parts of those reports upon which the contention is based are upon subjects not strictly within the purpose and intent for which the commission making such reports was created? If such adoption is a fact, then the members of the Mississippi River Commission and their engineers knew it. Why was their testimony not taken upon this all important point instead of asking the court below and this court to "indulge an inference" from the portions of the reports mentioned; and particularly since the establishment of this fact might tend to throw upon one of the parties a responsibility so great as to be termed "immeasurable".

**(3) The Government, for the purpose of improving navigation, had the right to close the Bougere Crevasse.**

None of the levees constructed along the Mississippi River invade or are near the appellants' lands. Said lands are located miles away from any public works,

the nearest being the levee on the opposite side of the river in the State of Louisiana, in what is known as the Bougere Crevasse. (Finding XI, R., p. 27; Finding XVII, R., p. 30.) The Bougere Crevasse occurred during the flood of 1859 and remained open until 1902 or 1903, when efforts to close it first commenced. (Finding XVII, R., p. 30.) The United States finished the closing of this crevasse in 1910, by the erection of a levee 29 miles long and 23.4 feet high, which completed a continuous line of levee opposite appellants' lands. (Finding XVII, R., p. 30.)

The question for determination on this branch of the case, then, is whether the Government had the right to preserve the low water bank of the river by the construction of this levee on the top of the bank in what had been a high-water channel, for the purpose of maintaining the integrity of that bank and confining the flood waters in the improvement of navigation.

This court in *Bedford* v. *United States* (192 U. S., 217) sustained the right of the Government to construct works to preserve the channel of the Mississippi River by preventing the erosion of its banks and in this way confining it within its banks. What, then, are the banks of the Mississippi River? This question has been answered in the case of *Hart* v. *The Board of Levee Commissioners for the Parish of Orleans* (54 Fed. Rep., 559, 561), and also by article 457 of the Civil Code of the State of Louisiana, which reads as follows:

> The banks of a river or stream are understood to be that which contains it in its ordi-

> nary state of high water; for the nature of the banks does not change, although for some cause they may be overflowed for a time. Nevertheless, on the borders of the Mississippi and other navigable streams where there are levees established according to law the levees shall form the banks.

After quoting the above article of the Civil Code of Louisiana, the Circuit Court for the Eastern District of Louisiana said:

> It follows that, no matter what would be the law in other States, in Louisiana, so far as relates to the Mississippi River, the levees established according to law are the banks. Wherever the levees are located, there are the banks of the river. * * * When it is considered that the Mississippi River is such a vast body of water, continually changing its bed or channel, not alone by abrupt movements but by those insidious and impalpable changes which require new banks to be built to protect not alone the land immediately adjacent but that lying in the rear over which the floods, if unrestrained, would sweep and flow, it is seen how wise and at the same time how just is the statutory determination of the banks of the Mississippi River. * * * This definition of the banks seems to have been adopted from an early period as being the controlling direction as to what courts shall consider the bed of the Mississippi River. (54 Fed. Rep., 559, 561; *Henderson* v. *Mayer*, 3d La., 567; *Bass* v. *State*, 34 La. An., 498, 499.)

If, then, the banks of this river are "that which contains it in its ordinary state of high water," had the Government the right to preserve such bank by the construction of the Bougere Crevasse levee? This question presents a case strikingly similar to the case of Bedford, *supra*, which also resulted from the improvement of the Mississippi River. The facts in that case show that the Mississippi River, by natural processes in time of flood, changed its channel and began to erode the bank at Delta Point, in Louisiana, which was neither upon nor in contact with the Bedford land. The Government revetted the bank at this point and thereby deflected the current over upon the land of Bedford, which was across the river and below the point of revetment, and in so doing caused the destruction of that land. In that case this court, on appeal from the Court of Claims, held:

> Damages to land by flooding as the result of revetments erected by the United States along the banks of the Mississippi River to prevent erosion of the banks from natural causes are consequential and do not constitute a taking of the lands flooded within the meaning of the fifth amendment of the Federal Constitution.

The decision of the court in the Bedford case followed the lines laid down by the court in *Gibson* v. *United States* (166 U. S., 269) which Mr. Justice McKenna, in delivering the opinion of the court, distinguished from *Lynah* v. *United States* (188 U. S.,

445), relied upon by counsel for appellant as one of the leading cases, in the following language:

> The question was asked: "Does this amount to a taking?" To which it was replied: "The case of *Pumpelly* v. *Green Bay Co.* (13 Wall., 166) answers this question in the affirmative." And, further, "The Green Bay Company, as authorized by statute, constructed a dam across Fox River, by means of which the land of Pumpelly was overflowed and rendered practically useless to him. There, as here, no proceedings had been taken to formally condemn the land." In both cases, therefore, it was said that there was an actual invasion and appropriation of land as distinguished from consequential damage. In the case at bar the damage was strictly consequential. It was the result of the action of the river through a course of years. The case at bar, therefore, is distinguishable from the *Lynah case* in the cause and manner of the injury. In the Lynah case the works were constructed in the bed of the river, obstructed the natural flow of its water, and were held to have caused, as a direct consequence, the overflow of Lynah's plantation. In the case at bar the works were constructed along the banks of the river and their effect was to resist erosion of the banks by the waters of the river. There was no other interference with natural conditions. Therefore the damage to appellant's land, if it can be assigned to the works at all, was but an incidental consequence of them.

In the case of the *High Bridge Lumber Company* v. *The United States* (69 Fed. Rep., 320) it was held that:

> Neither a temporary flooding of other lands than those taken not amounting to a "taking" of the flooded lands, nor an anticipated change in the current of the stream, nor anticipated increase of danger to the property of the landowner from fire during the construction, is a proper subject of compensation, each being a purely consequential injury.

Mr. Justice Lurton delivered the opinion of the court in that case, and, referring to the case of *Pumpelly* v. *Green Bay Company, supra,* said:

> That case does undoubtedly hold that a flooding of private property may be regarded as a "taking." But that case was subsequently characterized as "the extremest qualification of the doctrine," as to nonliability for consequental injuries resulting from a public improvement and without negligence. (*Transportation Co.* v. *Chicago,* 99 U. S., 642.) The opinion just cited likewise calls attention to the fact that there was in that case an actual "physical invasion" of private property amounting to a "practical ouster." In this case there has been no present appropriation or physical invasion of any part of the remainder of the lands of plaintiff in error. There may never be such a permanent flooding as, under the Pumpelly case, will amount to "taking." If, as apprehended, the level of the

> river shall be raised, so as to flood the remaining lands of plaintiff in error, but not of such a permanent character as to amount to a permanent flooding and a practical ouster of the owner, as a riparian proprietor affected by such extraordinary or temporary flooding, will have sustained only such consequential damages as any and all other riparian proprietors will sustain as a consequence of the improvement of the river in the public interest. * * *
>
> What we hold is: First, that a mere temporary flooding, not amounting to a "taking," and not the result of negligent construction or maintenance, is an injury consequential upon the proper and lawful improvement of a navigable river, and is not such an injury as would be actionable. (69 Fed. Rep., 320, 326.)

See also *Meyer* v. *Richmond* (172 U. S., 83, 96); *Scranton* v. *Wheeler* (141 U. S., 150); *Mills* v. *U. S.* (46 Fed. Rep., 738); *Manigault* v. *United States* (199 U. S., 473–477).

If the United States, then, without invading Bedford's land, could lawfully construct a revetment to preserve the bank and thereby deflect the current upon Bedford, permanently flooding his land, why can not the United States, without invading Jackson's lands, lawfully construct a levee *to preserve the bank* and thereby increase the already existing flood heights on said lands, though not permanently flooding them?

What is the difference between what the United States did in the Bedford case and what they have

done in this case? The main difference is that a revetment is a work constructed below and against the bank, whereas a levee is a work constructed on top of the bank. But the purpose of the two works was the same—to preserve the channel of the river in the interest of navigation.

As the court below says, in its opinion, Rec., p. 36:

> The improvement of the Mississippi River through the instrumentality of a congressional commission manifestly purposes not only the reclamation of the extensive flood waters of the stream, but the erection of such permanent structures along its banks as would prevent the same from erosion and successfully resist the increased velocity of the current and the increased flood heights of the river. * * * It was alone concerned in an endeavor to establish settled conditions, throw the escaping flood waters back into their natural channels, and keep them there. It undertook to preserve the river, the channel the river itself had made in its meanderings from its source to its mouth.

The Bougere Crevasse was an opening in the banks of the Mississippi 29 miles long through which the flood waters escaped never to return to the river. The object of stopping the escape of these flood waters was twofold—to prevent them from washing away and destroying the bank of the river and to confine them in the natural channel which the river itself had established and thereby use their scouring power to improve the channel for navigation. The Bedford case establishes that the United States had

the right to preserve the bank of the river within the Bougere Crevasse by the erection of a revetment against that bank and in the bed of the river to prevent the erosion of that bank from the side. Why, then, had it not the right to preserve that same bank by the erection of a levee on the top thereof to *prevent washing from the top*, even if it were necessary to go higher than the top of the original bank. The history of the Mississippi River shows that when in flood that river constantly changes its channel, cutting through necks of land and leaving many miles of its former course entirely separated from its new channel. The findings in this case show that the flood waters of the Mississippi, which escaped through the Bougere Crevasse, found their way to the Gulf of Mexico through the Atchafalaya and other rivers, bayous, and streams. The very word "crevasse" shows that these flood waters had in 1859 broken through the bank and washed the same from the top. These flood waters were doubtless still washing this bank, and it is very easy to see that a few unusual floods, such as have occurred since this case was tried in the court below, might have made in the Bougere Crevasse one or more new channels for the river, even to the extent of turning the whole river through this crevasse and letting it dissipate itself into small streams and bayous, eventually finding its way to the Gulf through channels other than that which it has pursued in a general way since the memory of man. Such a result would have utterly destroyed navigation of this stream. There are no large tributaries joining the Mississippi below the Bougere Crevasse,

and its present flow below that point might have been thus reduced to such an extent as to be valueless for commerce and navigation. In view of the decisions, can it be for a moment contended that the General Government had not the right to take whatever means might have been necessary to prevent such a catastrophe—to keep the river in the channel which it has itself made by its meanderings from its source to its mouth, and preserve and improve navigation?

In this case the Government prevented the bank from washing away from the top by flood waters, and in the Bedford case it prevented the bank from washing away from the side as the result of flood waters changing the channel. It is a circumstance particularly to be noted in this connection that in the Bedford case it was flood waters which caused the first erosion of the bank by changing the channel of the river, and that in this case it was flood waters which caused the first crevasse in the bank, which subjected that bank to later washing from the top by succeeding flood waters and consequent danger of entire disintegration.

There can be no contention but that the Government had the right to construct its works erected for that purpose in such a manner as to be permanent—that is, higher than the original bank, and as high as, in the opinion of the engineers, was necessary to preserve the channel. And this is what was done.

## Conclusion.

For these reasons, appellees ask that the judgment of the court below in this case be affirmed.

MARY E. HUGHES, APPELLANT,
*v.*
THE UNITED STATES.
No. 718.

**Wigwam plantation.**

The Wigwam plantation in the Hughes case, No. 718, is situated like the lands in the Jackson case, No. 720, in that it lies between the foothills and the east bank of the river, with the levee line opposite and across the river. Its location is exactly described at page 54 of appellant's brief.

As to this plantation, the petition was dismissed in the court below on the authority of the decision in the Jackson case, No. 720, and the appeal is submitted on the brief for the United States in that case.

For the same reasons stated in the Jackson case appellees ask that the judgment of the court below in this case be affirmed.

THE HUGHES CASE.

THE UNITED STATES, APPELLANT,
*v.*
MARY E. HUGHES. } No. 719.

## Timberlake Plantation.

### STATEMENT.

The Timberlake plantation is not adjacent to the Wigwam plantation, but situated at an entirely different point on the river. Prior to 1898 it was protected by a levee, built by State and local authorities, in front of the land and closely skirting the river bank. About 1898, the United States located a levee line, which is known as the Huntington Short Line, three or four miles back from the river bank, behind the Timberlake plantation and the old levee constructed by the local authorities. The construction of the Huntington Short Line placed the Timberlake plantation between the levee lines on each side of the river and joined up the levee system on the same side of the river in that locality, making a continuous levee line behind this plantation.

While the Huntington Short Line was being constructed, and about the year 1903, a break occurred in the old levee constructed by local authorities, and the flood waters flowed over the space of ground

between that old levee and the Huntington Short Line levee, in which space the Timberlake plantation is located. These flood waters threatened destruction of the Huntington Short Line, and the officers of the United States dynamited the old levee to relieve the pressure against the Huntington Short Line. The dynamiting of the old levee at the upper end let in a greater volume of flood water over the land between the old levee and the Huntington Short Line and covered the Timberlake plantation with deposits of gravel and sand. It is claimed that this amounted to a taking by the United States for public purposes, under the fifth amendment of the Constitution, with a consequent implied contract to pay for same.

## ARGUMENT.

### Damage due to levee system as a whole.

Findings XI, XII, and XIV, pages 13 to 14 of the record in the Hughes case, show that the damage to the Timberlake plantation is due to the levee system as a whole, which levee system, as already seen in these cases, was constructed partly by the United States and partly by local authorities.

Counsel for the appellant in this case (No. 719) contend that appellee can not, therefore, recover because it is impossible to fix the liability, which is only partly that of the United States, and in support of that contention here refer to that portion of this brief relating to the Jackson case (No. 720) under the heading, "The levee system is not the work of the United States alone," p. 2.

**The damage is consequential.**

The facts as to the improvement of the river for navigation and its result as to damage done to the Timberlake plantation, are in all respects like the facts in the Jackson case, No. 720, save one, and that is the high-water flow of the river is obstructed by the levee placed in the front or west of the Jackson land; while in this case the high-water flow of the river is obstructed by a levee placed in the rear or east of the Hughes land. The United States constructed in a gap in the levee system a section of levee which increased the flood heights on the Jackson land. The United States constructed at a point in the levee system where the local levees were weak, a cut-off section of levee known as the Huntington Short Line, which increased the flood heights on the Hughes land. The result in each case is an elevation of the flood heights and consequential injury. The court below, in its opinion at page 36, says:

> The Bedford case establishes that the United States, in the exercise of its plenary power and authority over the navigable streams of the country in aid of commerce and navigation, can by public works resting only against the banks of the channel prevent the same from erosion and preserve its natural identity; that consequences, however injurious, resulting from such procedure are but natural results, consequential in character, and damnum absque injuria. The improvement of the Mississippi River through the instrumentality of a congressional commission manifestly pur-

posed not only the reclamation of the extensive flood waters of the stream but the erection of such permanent structures along its banks as would prevent the same from erosion and successfully resist the increased velocity of the current and the increased flood heights of the river. The Government was not concerned in the reclamation of riparian lands and was without authority to expend money for the purpose. (Act Mar. 3, 1881; 21 Stat., 468–474.) It was alone concerned in an endeavor to establish settled conditions, throw the escaping flood waters back into their natural channel and keep them there. It undertook to preserve the channel of the river, the channel the river itself had made in its meanderings from its source to its mouth.

The claimants' lands, unfortunately situated as were the lands of Bedford, suffered from this improvement in that they were more frequently overflowed than theretofore and the resultant deposits were more extensive. (P. 16 of the opinion.)

*The claimant's lands in the present case, unfortunately situated as were the lands of Jackson and Bedford, suffered from the construction of a levee in the rear or east of it in that they were more frequently overflowed and the resulting deposits were more extensive.*

Counsel for the United States has already endeavored in this brief to show that the court below was right in its judgment in the Jackson case, No. 720, and here refers to that portion of this brief in

additional support of the contention that the court erred in arriving at a different conclusion in this case because the facts are essentially the same.

For these reasons appellants ask that the judgment of the court below in this case be reversed.

**Private levees.**

The record shows that the lands of appellants in the Jackson case, No. 720, had formerly been protected by private levees and embankments (Finding I, R., p. 19; R., p. 39), and it would seem that it is not impossible for them to be so protected now. The court below says (R., p. 39):

> If so, the duty is cast upon them and the damages claimed thereby materially minimized, if not fully prevented. (*Manigault* v. *Springs*, 199 U. S., 473–483, R., p. 39.)

The fact that the Mississippi River Commission has reported that to levee these lands would cost more than they are worth can have no bearing on this feature of the case, since it is not shown that appellants' lands are not of more value than the average lands within the small basins within the Homochitto levee district. It may be that a large portion of the land within these basins is either swamp or land of less fertile nature than those immediately touching the river, as appellants' lands do. If appellants in former years could construct a levee which they have testified protected them from

any except the highest overflow, then there is no apparent reason why the same levee of greater strength and height would not now protect them from the higher overflows, and also avoid the necessity of building the same upon any other land than their own.

The same is true of the Hughes cases, particularly the Timberlake plantation.

### Conclusion.

It is therefore respectfully submitted that the judgment of the Court of Claims in the Jackson case, No. 720, and the Hughes case No. 718, should be affirmed, and the judgment in the Hughes case, No. 719, should be reversed, because:

(1) The damage to the lands was not the act of the United States alone;

(2) The damage is consequental and does not constitute a taking under the 5th amendment of the Constitution;

(3) The duty is cast upon the owners of the lands to prevent such damage by private levees.

JOHN Q. THOMPSON,
*Assistant Attorney General.*

J. HARWOOD GRAVES,
*Assistant Attorney.*

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1912.

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## No. 718.

MARY E. HUGHES, APPELLANT,

vs.

THE UNITED STATES.

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## No. 719.

THE UNITED STATES, APPELLANT,

vs.

MARY E. HUGHES.

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APPEALS FROM THE COURT OF CLAIMS.

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INDEX.



52336—12——1

1 I. *Original petition.*

Filed March 31, 1910.

In the Court of Claims.

MRS. MARY E. HUGHES
*vs.*
THE UNITED STATES. } No. 30606.

PETITION.

*To the honorable the Court of Claims:*

The petition of Mrs. Mary E. Hughes, a resident and citizen of the State of Illinois and county of Cook, respectfully shows:

1. That she owns and possesses that certain tract of land, and cotton plantation, situated in the State of Mississippi, and county of Bolivar, on the Mississippi River, opposite to Arkansas City, known as the Timberlake plantation; bounded on the north and west by the Mississippi River, on the east by lands of Chappe, Wilkinson, and Shelby, and on the south by lands of Duncan & Lep. Lewey, containing 1,500 acres of cleared land, 1,300 acres woodland, and 200 acres of batture.

2. That she owns and possesses that certain tract of land, and cotton plantation, situated in the State of Mississippi, and county of Warren, on or near the Mississippi River, about two miles below the corporate limits of the city of Vicksburg, known as the Wigwam plantation; bounded on the north by lands of Crandell heirs, on the east by lands of Stout & Roach, on the south by lands of Mattingly, and on the west by Dabney & McCabe, containing 150 acres of alluvial land, of which 100 acres is cleared and 50 acres woodland.

3. That before and at the time of the injuries complained of she owned and possessed that certain tract of land, and cotton plan-
2 tation, situated in the State of Louisiana and parish of Madison, on the Mississippi River, opposite to the city of Vicksburg, known as De Soto Island, bounded on the north by Lake Centennial, on the east by the Yazoo River, and on the south and west by the Mississippi River, containing 127 acres of cleared land and 100 acres of batture.

4. That before and prior to the year 1890 said plantations were, from their natural situation, comparatively high and secure from overflow by the flood waters of the Mississippi River, except at long intervals, and the occurrence of such overflows did not materially affect their productive capacity or their value.

5. That said plantations were highly improved, well stocked with tenants and laborers, yielded yearly large crops of cotton, cotton seed, corn, hay, and other products, and were then worth, and except for the injuries complained of would be now worth, the sum of eighty-five thousand, ten thousand, and twenty-five thousand dollars, respectively.

6. That for time beyond the memory of man the flood waters of the Mississippi River, passing Helena, Arkansas, where the highlands abut on the river, had escaped into the White River and Upper Tensas Basins, and passed in part through the Boeuf Cut-off into the Ouachita Basin, and in part down the Bayous Macon and Tensas, and on by the Atchafalaya River to the Gulf of Mexico, and if they ever reached the alluvial lands of the claimant in sufficient volume to flow them, were speedily reduced by crevasses on the west bank, which allowed them to escape into the basins and thus relieved the lands of the claimant, and all the resources of the State and local authorities had never been able to confine the said flood waters or to divert them from their natural flow.

7. That about the year 1883 the then existing levee system having been practically destroyed by the great flood of 1882, and the State and local authorities having no means of restoring them, the officers and agents of the United States, in pursuance of the act of Congress of 1879, creating the Mississippi River Commission, and of the subsequent acts for the improvement of the navigation of the Mississippi River, adopting the so-called Eads' plan, projected and have constructed and are constructing a system of public works for the purpose of so confining the flood waters of the river between lines of embankment or levees as to give increased elevation and velocity and force to the currents in order to scour and deepen the channel, and have thus caused an abnormal and increased elevation of at
3 least eight feet to the waters of the river at high water or flood stage; and for said purpose have adopted and made use of systems of public and private levees, originally constructed for the reclamation of overflowed lands on the west bank from the highlands of Arkansas to the mouth of the Red River, and from the mouth of the Red River to the Passes, and on the east bank from the highlands of Tennessee to Brunswick, and from Baton Rouge to the Passes, but from Brunswick to Baton Rouge, instead of constructing and adopting levees, have made use of the highlands skirting the river for said purpose, and have thus placed the lands of the claimant, and of others similarly situated, between the lines of embankment on the west bank, with an increased grade of ten feet, and the highlands on the east bank, in the adopted high-water bed of the river, and exposed to the destructive action of the currents of the river, thus confined, with such increased elevation, velocity, and force and have three times recommended that Congress make some provision for the adjustment of the equitable claims of the landowners in such cases, but that Congress has failed and neglected to make such provision, and this court has held that no action of Congress is necessary to give it jurisdiction and that the Government is under a constitutional obligation to make compensation.

8. That in pursuance of their said plan, the officers and agents of the United States have constructed, and maintain, a system of levees from Helena to the mouth of White River, and from the highlands of Arkansas to the Louisiana line, and have thus prevented the flood

waters of the Mississippi River from passing into the bayous Macon and Tensas, and Boeuf, Ouachita, and Atchafalaya Rivers, where they were wont to flow in times of high water, and have confined all of the flood waters within the main channel, made much narrower, and have brought them down on the lands of the claimant between the systems of embankment, and have thus caused a much greater volume to pass over the lands than ever before and to raise the river at those points much higher.

9. That in pursuance of their said plan, the officers and agents of the United States have constructed, and maintain, levees at the most important stations on the river, where the State and local authorities were unable to confine the flood waters, and have closed the outlets by which, in times of high water, the flood waters escaped into the basins, and have thus prevented the flood waters from passing into the Tensas and Ouachita Basins, where they were wont to flow
4 in times of high water and have confined the flood waters within the main channel, made much narrower, and have so obstructed, and are so obstructing, the passage of the flood waters below as to cause them to back up and overflow the lands of the claimant; and that the acts herein complained of were wholly and entirely the acts of the United States, and that the State and local authorities contributed nothing thereto, except in so far as they were compelled to raise their levees for their own protection.

10. That in pursuance of their said plan, the officers and agents of the United States, about the year 1898, instead of revetting the banks to prevent the destruction of their works opposite Arkansas City by the threatened erosion because of the failure of Congress to make the necessary appropriations called for, abandoned their said works and located and constructed a new line of levee at some distance from the banks of the river, and took and destroyed the property of the claimant for their said purpose. That said new levee threw out the whole plantation of the claimant, with the buildings and improvements thereon, of the value of $85,000.00, exposed to the destructive action of the currents of the river, thus confined, with such increased elevation, velocity, and force, and thereby entirely destroyed their value. That under the levee conditions existing prior to the closing of the basins and the diversion of the flood waters from their natural course, and the confinement of the increased volume by the works of the United States aforesaid, said lands, although exposed, would have needed no protection, and would still be susceptible of cultivation, and valuable as batture lands, but that, subjected as they are to the action of the currents of the river, with the increased velocity and force, and to the repeated flowings, situated as they now are between the levee systems, in the artificial bed of the river, they have become a part of the bed of the stream, and practically taken for the uses of the United States aforesaid.

11. And are so raising, enlarging, and strengthening, adding to and constructing such levees as to cause the lands of the claimant, so situated, to be flowed repeatedly and continuously by the waters

of the river, thus confined, and to destroy the crops growing and grown thereon, and to drown the live stock, and to undermine and wash away the buildings, fences, and other improvements, and to fill up the drains and ditches, and to wash off the soil, and to cover the lands with superinduced additions of water, earth, sand, and gravel, and to entirely destroy their value.

5 12. That by reason of the premises aforesaid, the lands of the claimant, which before the undertaking by the United States to improve the navigation of the river were, from their natural situation, comparatively high and secure from overflow, and needed no protection, have been flowed by the waters of the river, thus confined, in the years 1890, 1891, 1892, 1893, 1897, 1898, 1899, 1903, 1904, 1906, 1907 twice, 1908 four times continuously, and 1909 three times successively, and the crops growing and grown thereon have been each year destroyed by said overflows, so caused, and the live stock drowned, building and fences and other improvements undermined and washed away, and the ditches and drains filled up, and the soil washed off, and the lands covered with superinduced additions of water, earth, sand, and gravel, so as to render them unfit for use and to entirely destroy their value and to compel their abandonment, to the injury of the claimant, as follows, to wit:

| | |
|---|---|
| 1890—To loss of rents | $1,816.00 |
| 1891—To loss of rents | 1,816.00 |
| 1892—To loss of rents | 1,816.00 |
| 1893—To loss of rents | 1,816.00 |
| 1897—To loss of rents | 1,816.00 |
| 1898—To loss of rents | 1,816.00 |
| 1899—To loss of rents | 1,816.00 |
| 1903—To loss of rents | 13,816.00 |
| 1904—To loss of rents | 13,816.00 |
| 1906—To loss of rents | 13,816.00 |
| 1907—To loss of rents | 12,800.00 |
| 1908—To loss of rents | 12,800.00 |
| 1909—To loss of rents | 12,800.00 |
| To value of lands and improvements | 108,000.00 |
| Total | $200,560.00 |

And your petitioner says that this confinement and this precipitation and this backing of the waters of the river by the works of the United States for the improvement of the navigation of the river, so as to place the lands of the claimant in the artificial bed of the river and subject them to repeated and continuous flowings and to the destructive action of the currents, with such increased elevation, velocity, and force as to destroy the crops growing and grown thereon and to drown the live stock, and to wash away the buildings, fences, and other improvements, and to fill up the drains and ditches,

6 and to wash off the soil, and to cover the lands with superinduced additions of water, earth, sand, and gravel, and to render them unfit for cultivation, and to entirely destroy their value, and to compel their abandonment, is such a serious interruption to the common and necessary use of the property as to deprive the claimant of the beneficial use and to practically destroy the value,

and to be equivalent to a taking within the meaning of the constitutional provisions; and being done in pursuance of the acts of Congress authorizing it for the public benefit, and under the direction of the Mississippi River Commission and the Secretary of War, imposes on the Government an implied obligation to make compensation for the property so taken and destroyed.

That their said claims have been at all timese recognized by the said officers and agents of the United States, and assurances of compensation or protection have been at all times held out to them, by which they have been induced to refrain from pressing the said claims, and the Government is now equitably estopped to plead the statute of limitations, in bar of their claims for the crops and other property so taken and destroyed prior to the year 1904.

That no other action than as aforesaid has been had on this claim in Congress or by any of the departments.

That the claimant is the sole owner of this claim, and the only person interested therein; and that no assignment or transfer of this claim, or any part thereof, or interest therein, has been made.

That the claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets.

That the claimant is a citizen of the United States, and believes the facts as stated in this petition to be true.

And the claimant asks judgment for the sum of $200,560.00 (two hundred thousand five hundred and sixty dollars), and for the further sum of $12,800.00 (twelve thousand eight hundred dollars) for each year until just compensation is paid.

WADE R. YOUNG,
*Attorney for Claimant.*

STATE OF MISSISSIPPI, *County of Warren:*

Mrs. Mary E. Hughes being by me duly sworn, deposes and says that she is the claimant in this case, in the Court of Claims. That she has read the above petition, and that the matters therein stated are true to the best of her knowledge, information, and belief.

Mrs. MARY E. HUGHES.

Sworn to and subscribed before me, this 22d day of March, 1910.

[SEAL.]

W. L. NICHOLSON,
*Notary Public.*

7 II. *Amended petition.*

Filed by leave of court April 9, 1912.

*To the honorable the Court of Claims:*

The amended petition of Mary E. Hughes, the claimant in the above styled case, respectfully shows:

1. She desires to amend her original petition filed herein on March 31, 1910. She adopts each and every allegation of said original petition as fully as though each allegation was copied herein at length,

except as to the value of Timberlake plantation, which she avers is $150,000.00, and Wigwam plantation, which she avers is $15,000.00, and so amends said valuation and asks the court to so find the facts.

Claimant therefore prays that this her amended petition be filed and judgment rendered in her favor against the United States for the sum of $165,000.00 as the value of said land and improvements, instead of the sum claimed in said original petition.

MARY E. HUGHES,
By WAITMAN H. CONAWAY,
*Attorney of Record.*

DISTRICT OF COLUMBIA, *Washington City, ss:*

Waitman H. Conaway, being by me first duly sworn, deposes and says that he is the attorney of record for the claimant Mary E. Hughes in the above-styled case; that he knows the contents of the foregoing amended petition, and believes the facts and allegations therein contained to be true, to the best of his knowledge, information, and belief.

WAITMAN H. CONAWAY,
*Attorney of Record.*

Taken, sworn to, and subscribed before me this 4th day of April, A. D. 1912.

[SEAL.] EDWARD KEEGIN,
*Notary Public, D. C.*

Mr. Randolph authorizes me to take acknowledgment.

8 III. *Traverse.*

Filed May 23, 1912.

In the Court of Claims of the United States.

December term, A. D. 1911.

MARY E. HUGHES
*vs.*
THE UNITED STATES. } No. 30606.

And now comes the Attorney General on behalf of the United States, and answering the petition of the claimant herein denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
*Assistant Attorney General.*

9 IV. *Argument and submission of case.*

On the 23rd day of May, 1912, this case came on to be heard. Mr. Waitman H. Conaway was heard for the claimant, Mr. W. W. Scott was heard for the defendants, and the case was submitted.

10 V. *Findings of fact and conclusion of law.*

Filed June 17, 1912.

MARY E. HUGHES
*v.*
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT.

I.

From time immemorial the flood waters of the Mississippi River during the highest stages thereof, when not contained within the low-water banks of the river, naturally found outlet below Cairo into the St. Francis Basin, and below the highlands near Helena, Ark., in the White River, Yazoo, Tensas, Atchafalya, and Pontchartrain Basins, and through the rivers draining these basins eventually into the Gulf of Mexico. The outlets and drains thus provided by nature were such as to accommodate said flood waters, and the lands of claimant were not overflowed as frequently before the outlets were closed by levee construction by the United States to improve the river navigation, and by the State and local authorities to protect and reclaim land subject to overflow in times of high water, and consequently were but little injured by said overflows.

From as far back as the records show the flood stages of the Mississippi River, the high-water bed of that river was between the highlands on the east side and the highlands on the west side. The Timberlake plantation of the claimant in controversy in this suit is located within this boundary in Bolivar County, Miss.; that is, between the highlands on the Mississippi side of the river and the highlands on the Arkansas side of the river.

II.

Prior to the year 1883 the States and local authorities had constructed unconnected lines of levees for the protection and reclamation of lands subject to overflow from the mouth of Red River to the mouth of Arkansas and from the mouth of the Yazoo to the highlands below Memphis. The flood waters of 1882 destroyed miles of these levees.

11 Beginning about the year 1883 and continuing to the present time the officers and agents of the United States, pursuant to an act of Congress creating the Mississippi River Commission and

the other acts amendatory thereof, and for the improvement of the Mississippi River for navigation adopted a plan, the so-called Eads plan, and in consequence thereof have projected and constructed and maintain, and are now engaged in constructing and maintaining, certain lines of levees on both sides of the river at various places for various distances from Cairo, Ill., to near the Head of the Passes, a distance of 1,050 miles by river from Cairo, and the local authorities or organizations of the States bordering along the river on both sides from Cairo to the Gulf have before and since 1883 constructed and are now constructing and maintaining certain lines of levees at various places and of various lengths for the purpose of protecting and reclaiming lands within their respective districts from overflow in times of high water.

The levee lines so constructed by the United States and local authorities have been joined by the United States, thus giving a continuous line of levees as contemplated by the Eads plan, with the result that the flood waters of the Mississippi River to a great extent are confined within and between said levee lines and encompassed within a narrower high-water channel than heretofore, acquired an increased velocity and higher elevation, and the current thereof has become stronger and more forceful.

The plan of the officers and agents of the United States so acting was to increase said velocity and scouring power of the water and to scour and deepen the channel of the Mississippi River and thereby improve it for navigation, and the purpose of the officers and agents of the State and local authorities constructing lines of levees at various points along and on both sides of the river was to reclaim and to protect land from overflow in times of high water. By so doing the waters being thus confined within a narrower compass, as above indicated, have attained a higher elevation of approximately 6 feet in times of high water.

III.

The act of Congress, March 3, 1881, carrying the first appropriation by the United States provided that no portion of the appropriation should be used in the repair or construction of levees for the purpose of preventing injury to land by overflows, or for any other purpose, except as a means of deepening and improving the channel, in the interest of navigation.

The subsequent acts of Congress of January 19, 1884; July 5, 1884; August 5, 1886; July 31, 1888; and March 3, 1891, also provided that no portion of the appropriation should be expended for the purpose of reclaiming lands, or preventing injury to lands or private property by overflow, and the commission was authorized to use said money in building levees, if in their judgment it should be done, as a part of their plan to afford ease and safety to the navigation and commerce of the river and to deepen and improve the channel.

## IV.

Before the creation of the Mississippi River Commission by act of Congress and the adoption of the Eads plan as aforesaid, the levee lines along the Mississippi River theretofore constructed by
12 State and local authorities consisted of a broken chain of levees of insufficient height and strength to confine the flood waters and had been built without regard to a uniform grade line. The United States then caused a survey and report to be made by its officers and agents showing the condition and location of levee lines theretofore constructed by State and local authorities as they then existed. This survey suggested a proposed continuous system of levees from Cairo to the Head of the Passes. In many instances it was a blanket survey which encompassed and took in the lines of levee theretofore constructed by State and local authorities as above stated. The project recommended by the Mississippi River Commission adopting the Eads plan for the systematic improvement of the river from Cairo to the Head of Passes was adopted by act of Congress approved March 3, 1881.

The United States then undertook the projection and completion of a continuous line of levees from Cairo to the Head of the Passes, as suggested by this survey and the Eads plan and as recommended by the Mississippi River Commission, and, in furtherance of that plan and as a part of and supplementary thereto, adopted to their use and is now using the levees theretofore constructed by State and local authorities, thereafter making them much larger and stronger. Since that time levee construction, whether done by the United States or State and local authorities, has been under the direction and control of the Mississippi River Commission and in conformity with the grades and methods of construction adopted by said commission, and the present efficiency of the levee system has been largely due to this fact. The extension of the levee system by the United States from Cape Girardeau, Mo., to the Head of the Passes was authorized by acts of Congress in 1906 (34 Stat. L., p. 208).

## V.

From Cairo, Ill., to near the mouth of the Yazoo River, just north of Vicksburg, the Mississippi River is practically leveed on both sides, except on the east side where the highlands abut on or near the river in Kentucky and Tennessee (from Port Jefferson, Ky., to a short distance south of Memphis, Tenn.), and thence on the west side to near the Head of the Passes, or to a point 1,050 miles by the river from Cairo, and on the east side from Baton Rouge to the same point near the Head of the Passes, leaving a gap in the line of levees of 234 miles in length, from the mouth of the Yazoo River to Baton Rouge, unleveed, where the foothills hug closely to the east bank of the river and serve as levees.

The extension of the general levee system by the United States and the local authorities since the United States adopted to its use and assumed "permanent control" of the levees theretofore constructed by State and local authorities has resulted in an increased elevation of the general flood levels, which subjects the claimants' lands to deeper overflow than they were subject to formerly or would be subject to now if the levee system were not in existence, and consequently has destroyed its value for agricultural and grazing purposes, causing its abandonment. The immediate cause of the deeper overflow of claimants' land is the increased elevation of flood heights, which is the result of the general confinement of the flood discharge by the levee system as a whole.

13 VI.

During the flood waters of 1882 the levees failed throughout the length of the river. In 1884 the crevasses were still open in the basins. In 1886 crevasses were open in the upper Tensas district and the levees practically intact in the lower Yazoo district opposite the upper Tensas. In 1887 all crevasses were closed. In 1890 there were eight crevasses in the upper Tensas and seven in the lower Yazoo districts. In 1891 all 1890 crevasses were closed and the flood waters of that year made one crevasse in the upper Tensas and one in the lower Yazoo districts. In 1892 all crevasses were closed, but the flood waters made six crevasses in the levees located along the stretch of river in the upper Tensas district. In 1893 all crevasses were closed, but the flood waters of that year made four crevasses. In 1897 all crevasses were closed, but the flood waters of that year made five crevasses in the lower Yazoo district in Mississippi. From 1898 to 1902 there were no crevasses, and only one crevasse in the upper Tensas district in 1903, and all crevasses closed from 1904 to 1910.

VII.

In consequence of the closing of the natural basins, outlets, and crevasses by the United States and the State and local authorities, as aforesaid, the channel of said river has been scoured and many waste and overflowed lands on both sides of said river behind said levees have been incidentally reclaimed and are now protected from overflow in times of high water, and vast benefit has accrued to the States of Illinois, Kentucky, Tennessee, Mississippi, Arkansas, and Louisiana by reason of said levee construction and to the landowners of the States behind said levees, but that the land of claimant, situated between said levees and on the outside thereof, between the line of levees and the river, in the present narrowed high-water channel thereof, and not protected thereby, as hereinafter more fully described, has been, and is now, subjected to repeated and destructive overflows which have rapidly and permanently covered said land with heavy deposits of sand, causing it to grow up with willows and

underbrush, rendering it unfit for cultivation, destroying its market value, and compelling its abandonment, it having no value unless it would be for speculative purposes only for the timber that may hereafter grow thereon.

## VIII.

That the levees as constructed by State and local authorities, and afterwards adopted and added to by the Federal Government as hereinbefore stated, were located at places considerably back from the river bank so as to leave between them and the river, or between the levees on both sides of the river, lands which were not affected by them unless the flood tide of the river was permanently raised. The land in question in this case belonged to that class.

The construction of the levees made the high-water bed from 20 to 35 miles narrower and was followed by increased flood heights, which made it necessary to build the levees on both sides of the river higher and stronger from time to time. The grade established
14 by the Mississippi River Commission to which levees should be built was from 2 to 5 feet higher than the highest known water until June, 1910, when that grade was changed by the Mississippi River Commission to 3 to 5 feet above the highest known water, and since then the levees have been raised or constructed in accordance with that grade.

## IX.

### TIMBERLAKE PLANTATION.

Prior to the construction of the Huntington Short Line levee by the United States the waters of the Mississippi River did not overflow and submerge the Timberlake plantation hereinafter described at such frequent intervals and for such duration as to disturb the claimant in the profitable use, enjoyment, and possession thereof or so as to materially affect its cultivation, productive capacity, or market value. It was then suitable for the purpose of raising thereon, and there was profitably raised thereon, crops of cotton, cotton seed, corn, hay, and other products. Since the completion of said Huntington Short Line levee by the United States, placing the plantation of claimant between the old and new levee, in the restricted and narrower high-water channel of the river, the rises in the water of said river, by reason of the water being thus confined and restricted in its flow, have been, and are now, occurring at such frequent intervals and for such duration as to prevent the claimant from raising any kind of a crop thereon; the buildings have become untenantable and uninhabitable; the fencing washed away; the land covered with superinduced additions of water, earth, sand, and gravel to a depth of from 3 to 12 feet; said land has since grown up in willows, cottonwood, underbrush, and weeds so as to render it valueless to her; to destroy its market value; and to compel its abandonment.

The claimant, Mary E. Hughes, whose former name was Mary E. Burk, owns and possesses that certain tract of land and cotton plantation situated in the State of Mississippi and county of Bolivar, on the Mississippi River, opposite to Arkansas City, known as the Timberlake plantation; bounded on the north and west by the Mississippi River, on the east by lands of Chappe, Wilkinson, and Shelby, and on the south by lands of Duncan & Leopold Lewey, containing 1,500 acres of cleared lands, 1,300 acres woodland, and 200 acres of batture, more particularly described as follows:

Those several tracts of land lying in section two (2), three (3), four (4), five (5), in township twenty (20), range ten west, constituting Timberlake plantation, and embracing lots one (1) and two (2) of Timberlake division, being the same land conveyed or intended to be conveyed to A. B. Pittman by Mrs. Mary Clark, wife of M. Lewis Clark, and John Churchill, trustee, and also being the same lands decreed to be sold by final decree of the Circuit Court of the United States for the Southern District of Mississippi in the case of John Churchill and Mary Clark vs. Alfred B. Pittman, rendered at the November term, 1885, of said court; also the following lands in said Bolivar County commencing at the iron post between sections four (4) and five (5), township twenty, range ten west; thence running
15 south four 15/100 chains to post; thence south 88 degrees 17 minutes west 189.30 chains to the river bank; thence following said river bank up to a post between share No. two and three of the Timberlake plantation as described in the decree in cause No. 406 lately pending in the chancery court of said county of Bolivar; thence south 87 degrees 07 minutes east 66.90 chains to a point; thence south 87 degrees 07 minutes E. 103.13 chains to a post between shares No. two and three of said plantation, being the east corner of said shares two and three; thence south 36.70 to place of beginning, containing 744.01 acres of land more or less, and being the same lands conveyed by Charles Scott to A. B. Pittman in and by the deed dated January 23rd, 1883; also convey the following lands in said county of Bolivar: Lots two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8) in section five, all of lot six (6) in section six (6), all of lot seven in section seven (7), all of lot eight (8) in section eight (8), and all of sections two (2), three (3), and four (4), and lot one (1) in section five (5), all of the above-described lands in township twenty, range ten (10) west.

X.

Prior to 1898 said lands (Timberlake plantation) were comparatively high and secure from overflow by the flood waters of the Mississippi River, except at long intervals, and the occurrence of such overflows did not materially affect their productive capacity or market value. Said lands were highly improved, well stocked with tenants and laborers, yielded large crops of cotton, cotton seed, corn,

hay, and other products, were located adjacent to what was formerly the town of Huntington, located between the Huntington Short Line levee and the river, since washed away by the flood waters of the Mississippi River, and deserted as a place of residence by the inhabitants some years after the building of the Huntington Short Line levee—1898–1900—was very valuable as plantation property, and was worth the sum of ninety thousand dollars ($90,000).

The claimant, Mary E. Hughes, obtained $12,000 from the Board of Mississippi Levee Commissioners, by judgment, for damages to the drainage of the Timberlake plantation into Black Bayou when it was thrown out by the construction of the Huntington Short Line levee in 1898–1900. This plantation is located in the vicinity of and opposite the Arkansas City gauge and was protected from overflow up until the time of the construction of the Huntington Short Line levee.

XI.

Prior to the year 1898 said Timberlake plantation was protected from overflow by the flood waters of the Mississippi River by a continuous levee line located in front of said lands along, by, and close to the river bank for its entire frontage, built by State and local authorities, and said plantations still remained valuable for plantation purposes, and up to that time had not been seriously injured in its use and enjoyment by the flood waters of said river.

About the year 1898 the United States surveyed and thereafter began to construct what was known as and now called the
16 Huntington Short Line levee, a new levee, about 15 feet high, located some distance back from the old levee, behind the land of claimant, thus placing and permanently locating said Timberlake plantation between the Huntington Short Line levee and the old levee in the narrower high-water channel and bed of the river, placing an additional burden and servitude thereon and subjecting said property to more frequent and destructive overflows and the force and scouring power of the high-water current of said river. After the completion of the Huntington Short Line levee a high water came in the river during the year 1903 and because of a break in said old levee the water of said river began to flow onto and over the plantation of claimant, then located between the old levee and the Huntington Short Line levee, and remained standing on and over said land to a great depth after the high waters receded, and because of the great pressure of the water thus confined, standing against said Huntington Short Line levee, threatening its destruction by breaking through, the United States then caused the old levee to be blown up by dynamite in many places, so as to relieve the pressure of the water standing against the Huntington Short Line levee, and to save it, thus causing the water to rush over and across said land, injuring it for agricultural as well as all other purposes, greatly reducing its value.

XII.

In 1903 and since there were 150 laborers and tenants on said Timberlake plantation, about 65 head of mules, all necessary farming implements, 50 tenant houses, one large residence, one large storehouse, one large barn, gin house, blacksmith shop, and brick meat house, which were very valuable, and claimant ready and prepared to cultivate the entire property, but on account of the United States placing and permanently locating said plantation and property between said Huntington Short Line levee and said old levee, in the narrowed high-water channel of the river, and by blowing up the old levee, causing the water to flow onto and across said land with increased depth, velocity, current, and scouring power, and subjected to increased flood heights by being thus placed between said levees and said river, said buildings and property, as the result of the flood waters of 1907, 1908, 1909, and since, have become untenantable and uninhabitable, the fencing washed away, the land covered with superinduced additions of water, earth, sand, and gravel to a depth of from 3 to 12 feet, and said land has since grown up with willows, cottonwood, underbrush, and weeds, rendering it unfit for cultivation, agricultural purposes as well as all other purposes, causing the claimant to abandon it since the frequent, continuous, and destructive overflows of 1907, 1908, and 1909, it being also overflowed and inundated for the years 1910 and 1911.

XIII.

Each year since 1903 the claimant has been in the continuous, exclusive, and adverse possession of said property, exercising all the rights of ownership, attempting to cultivate said plantation, or a part thereof, but by reason of the frequent and destructive overflows of said property, as they have occurred, particularly for the
17 years 1907, 1908, 1909, and since, she has not been able to profitably use, occupy, or cultivate said land in any one year, and abandoned it for agricultural as well as all other purposes since said years 1907, 1908, and 1909, but maintains a caretaker thereon and in possession thereof at great expense in an effort to protect and use said property.

XIV.

Upon the foregoing facts the court finds as an ultimate fact, so far as it is a question of fact, that the effect of placing and permanently locating the Timberlake plantation of claimant between the Huntington Short Line levee and the old levee, and the river bank, was and is an act on the part of the United States intending to place, and which finally resulted in placing, the lands of claimant in the narrower highwater channel of the Mississippi River, subjecting it to more frequent and destructive overflows, and the forceful and destructive action of the current, placing an additional

burden and servitude thereon, which has finally resulted, since the years 1907, 1908, and 1909, in such serious and continuous interruption to the common and necessary use and enjoyment of said property, as to amount to a taking thereof by the United States under the fifth amendment to the Constitution.

WIGWAM PLANTATION.

XV.

Claimant owns and possesses a certain other tract of land and cotton plantation, situated in the State of Mississippi, county of Warren, on or near the Mississippi River, on the east bank, about two miles below the city limits of the city of Vicksburg, known as the "Wigwam plantation," more particularly described as follows:

Lots six (6) of section six (6), all that part of fractional section nine (9) north of the bayou; and east half (E. ½) of the southeast quarter (SE. ¼) of southwest quarter (SW. ¼) section eight (8), all in township fifteen (15), range three (3), containing 523 acres, more or less.

XVI.

Prior to the year 1890 said land from its natural situation was comparatively high and exempt from overflow by the flood waters of the Mississippi River, except at long intervals, and the occurrence of such overflows did not materially affect their productive capacity or market value. Said land was highly improved with tenants and laborers, yielded large crops of cotton, cotton seed, corn, hay, and other products, and was worth the sum of thirteen thousand five hundred dollars ($13,500).

XVII.

Said Wigwam plantation is located within the limits of that narrow strip of land lying between the Mississippi River and the highlands east of it, between Vicksburg and Baton Rouge, on the
18 east bank, where the highlands skirt very closely to the river bank and serve the purposes of levees, and is not protected by levee construction, as the expense of such levees would be out of proportion to the value of land to be protected, and they are not important to the improvement of said river for navigation.

XVIII.

The facts governing the action of the United States relative to levee construction within the limits of said strip of land mentioned in Finding XVII, have been found by this court in Mattie W. Jackson case, No. 18274, to which reference is made.

XIX.

As a result of the works of the United States when improving the Mississippi River in the interest of navigation, the said Wigwam plantation, since the year 1906, and particularly for the years 1907, 1908, and 1909, and since, has been overflowing at such frequent intervals and for such duration as to take from claimant the use, occupation, and enjoyment thereof and destroy its value; that 100 acres or more of said land have sand deposits permanently placed thereon as the result of said overflow, much of said land is grown up in willows and underbrush, rendering the residue thereof valueless for all purposes.

XX.

The claimant is the sole owner of said claims; no other action has been taken thereon, either in Congress, or by and before any of the department; and no assignment thereof, or interest therein, or any part thereof, has been made by her.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides as conclusions of law—

(1) That the claimant is entitled to recover for the value of the Timberlake plantation described in findings IX to XIV, inclusive, the sum of ninety thousand dollars ($90,000) on the authority of the cases of United States v. Lynah, 118 U. S., 445; United States v. Grizzard, 219 U. S., 180; and Archer v. United States, 47 C. Cls., —, upon the payment of which judgment the claimant is to execute a good and sufficient deed for said lands to the United States.

(2) That the claimant is not entitled to recover for the value of the Wigwam plantation described in findings XV to XX, inclusive, and her petition as to said plantation is therefore dismissed on the authority of the case of Jackson v. United States, 47 C. Cls., —.

19 VI. *Judgment of the court.*

MARY E. HUGHES
v.
THE UNITED STATES. } No. 30606.

At a Court of Claims held in the city of Washington on the 17th day of June, 1912, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant and do order, adjudge, and decree (1) that the claimant, Mary E. Hughes, is entitled to recover of and from the United States for the value of the Timberlake plantation described in Findings IX to XIV, inclusive, the sum of ninety thousand dollars ($90,000), on the authority of the cases of United States v. Lynah, 118 U. S., 445;

United States v. Grizzard, 219 U. S., 180; and Archer v. United States, 47 C. Cls., —, upon the payment of which judgment the claimant is to execute a good and sufficient deed for said lands to the United States. (2) That the claimant, Mary E. Hughes, is not entitled to recover for the value of the Wigwam plantation described in Findings XV to XX, inclusive, and that her petition as to said plantation is, and the same is hereby, dismissed, on the authority of the case of Jackson v. United States, 47 C. Cls., —.

BY THE COURT.

20 VII. *Application of claimant for, and the allowance of, appeal.*

From the judgment rendered in the above-entitled cause on the 17th day of June, 1912, the claimant, by Waitman H. Conaway, her attorney of record, on the 17th day of June, 1912, make application for, and give notice of, an appeal to the Supreme Court of the United States, from the order of the court dismissing the petition as to the Wigwam plantation.

WAITMAN H. CONAWAY,
*Attorney for Claimant.*

Filed June 17, 1912.

Ordered, that the above appeal be allowed as prayed for.

BY THE COURT.

June 17, 1912.

VIII. *Application of defendants for, and allowance of, appeal.*

From the judgment rendered in the above-entitled cause on the 17th day of June, 1912, in favor of claimant, the defendants, by their Attorney General, on the 17th day of June, 1912, make application for, and give notice of, an appeal to the Supreme Court of the United States.

JOHN Q. THOMPSON,
*Assistant Attorney General.*

Filed June 17, 1912.

Ordered, that the above appeal be allowed as prayed for.

BY THE COURT.

June 17, 1912.

21 Court of Claims.

MARY E. HUGHES
*v.*
THE UNITED STATES. } No. 30606.

I, Archibald Hopkins, chief clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-

entitled cause; of the findings of fact and conclusion of law; of the final judgment of the court; of the applications of the claimant and defendants for, and the allowance of, appeals to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 13th day of July, A. D. 1912.

[SEAL.] ARCHIBALD HOPKINS,
*Chief Clerk, Court of Claims.*

(Indorsement on cover:) File No. 23293. Court of Claims. Term No. 718. Mary E. Hughes, appellant, vs. The United States. File No. 23294. Term No. 719. The United States, appellant, vs. Mary E. Hughes. Filed July 15th, 1912. File Nos. 23293, 23294.

# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

# OCTOBER TERM, 1912.

## JACKSON *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 720. Submitted January 10, 1913.—Decided June 16, 1913.

This court considers it a grave error for the court charged with the duty of making findings of fact to include mere conclusions of law.

Statements as to what the relation of the United States is to levee work on the Mississippi River and what the power of the Mississippi River Commission over all such work is by whomsoever performed are conclusions of law and not of fact.

Congress did not, by the creation of the Mississippi River Commission, assume entire control of the levee work to the displacement of state or local authorities who continued to construct levees for protection from overflow which combined with those constructed by the United States for improvement of navigation, so that eventually a complete system would be evolved.

Damages, if any, by overflowing adjacent lands, occasioned by the levee system of the Mississippi River Valley could only result from concurrent action of the United States, the States and their subordinate agencies and individuals all impelled by different considerations, but all working towards the common end of having an efficient and continuous line of levees.

An individual owner has no right to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible.

An individual owner protecting his own property from a common natural danger acquires no right thereby to insist that other owners or the Government shall adopt the same method or that they shall not adopt different methods for the protection of their respective properties or for the public good.

The United States is not responsible for damages by overflow or for failure to construct additional levees along the Mississippi River Valley, so as to afford increased protection from increased overflow caused by the levees that were constructed by state and Federal authority at other points; nor do such damages amount to taking the land overflowed for public use within the meaning of the Fifth Amendment.

The rule that the United States has plenary power to legislate for the benefit of navigation and is not liable for remote or consequential damages caused by works constructed to that end has already been directly applied to the work of the Mississippi River Commission. *Bedford* v. *United States*, 192 U. S. 225.

THE facts, which involve the question of liability of the United States for damages alleged to have been sustained by the owner of a plantation in the Mississippi River Valley by reason of the improvement of the Mississippi River under direction of the Federal Commission charged with that work, are stated in the opinion.

*Mr. Waitman H. Conaway* for appellants.

*Mr. Assistant Attorney General John Q. Thompson* and *Mr. J. Harwood Graves* for the United States.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This suit was brought to recover from the United States the value of property asserted to have been totally destroyed or rendered completely valueless as the result of

certain public work "done in pursuance of the acts of Congress authorizing it, for the public benefit, under the direction of the Mississippi River Commission and the Secretary of War and the United States engineers." And it was charged that under the circumstances stated and the facts alleged, the property had been taken by the United States for public use "within the meaning of the constitutional provision," and it was averred that there was consequently imposed "on the United States an implied obligation to make compensation for the property so taken and destroyed."

It becomes necessary to give a brief description of the topography of the country in which the property in question is situated, in order to make clear its relation to the public work which it is asserted constituted a taking within the meaning of the Constitution.

The Valley of the Mississippi River, may in a broad sense be said to commence at Cape Girardeau, Missouri, and to extend from there to the mouth of the river at the Gulf of Mexico. The river, however, in its course to the ocean does not run through the center of the vast fertile and alluvial plains which in a comprehensive and generic sense constitute the delta of the Mississippi. On the contrary the situation of the river in this respect varies, occasioned by the fact that at divers places the upland or hill country approaches to or constitutes the bank of the river. The difference in this regard is marked between the west and the east banks. The west bank is divided into four great basins—the St. Francis Basin, which extends from Cape Girardeau to Helena; the White River Basin, which extends from Helena to the mouth of the Arkansas; the Tensas Basin, which extends from the mouth of the Arkansas to the mouth of the Red River; and the Atchafalaya Basin, extending from the mouth of the Red River to the Gulf. Practically in the long sweep from Helena, where St. Francis Basin ends and the White River Basin

begins, to the ending of the Atchafalaya Basin at the Gulf there is no real topographical distinction between the basins, the west bank of the river in that great distance consisting of alluvial country having generally a very wide though varying expanse. The division into basins putting out of view the St. Francis Basin, is therefore merely the result of a consideration of the watershed of each basin, all the water, however, from each ultimately finding its way to the Gulf of Mexico, either through the Mississippi River, or in the lower basins in part at least by the means of streams flowing independently of the Mississippi River to the Gulf of Mexico. On the east bank the situation is different. In the long stretch from Cairo, Illinois, to a point a short distance below Memphis, generally speaking, the hills and uplands border the river and constitute its bank. From the point below Memphis to which we have referred to Vicksburg, Mississippi, this is not the case, and there is a great basin known as the Yazoo Basin, which, aside from peculiarities of its own, may be said to possess the same general characteristics as the basins on the west bank of the river. From Vicksburg where the uplands come to the river and constitute its bank, down to Baton Rouge, Louisiana, where the hills or uplands permanently recede from the river a different condition from that which exists on the west bank obtains. As we are concerned only with the situation below Natchez we put out of view any statement concerning the east bank between Vicksburg and Natchez, and refer only to the conditions existing on the east bank between Natchez and Baton Rouge.

From Natchez where the hills or uplands constitute the bank of the river to Baton Rouge, the line of hill or upland does not follow the course of the river, but recedes therefrom for a certain distance and then again abuts on the river, this process being repeated from point to point until Baton Rouge is reached. Of necessity therefore be-

tween the point of each departure of the uplands from the river to the point of reapproach there is an area of alluvial country bounded on the west by the river and constituting its bank, on the east by the hills, which as it were like a festoon or semicircle inclose the alluvial area between the river, the base of the uplands or hills, and the points of departure from and approach to the river as above stated.

These various areas constitute in the nature of things, minor basins having their own watershed. And between Natchez and Baton Rouge there are five of these minor basins, one between Natchez and Ellis Cliffs, sixteen miles below Natchez, another between Ellis Cliffs and Fort Adams, thirty-nine miles below Ellis Cliffs, a third between Fort Adams and Tunica, seventeen miles below Fort Adams, and two others between Tunica and Bayou Sara, twenty-three miles below Tunica, and from Bayou Sara to Baton Rouge, a distance of thirty-five miles. These subordinate basins are included in a general local levee district known as the Homochitto district. A full and accurate statement concerning these basins, of their relation to levee building, and overflow, will be found in Document No. 1010, House of Representatives, 63rd Congress, third session, being a letter of the Secretary of War transmitting to the House of Representatives a full report of a survey made by direction of Congress, by the Mississippi River Commission, of these basins. Of the basin between Ellis Cliffs and Fort Adams, the report of the Commission makes the following statement:

"Between Ellis Cliffs and Fort Adams, a distance of 39 miles by river, lies a basin whose protection from floods is greatly complicated by the presence of lakes, streams, and swamps.

"It has a total area of 59,412 acres, including 9,781 acres of cleared and 49,631 acres of wooded land, the assessed value of which is $204,739.

"The systematic protection of the basin as a whole is

impracticable without including drainage work of large proportions.

"It will be observed that there is a large amount of cleared land which is now being cultivated although meagerly protected from floods by small private levees.

"Owing to the extent of swamp lands the cultivated area could not be greatly extended by the construction of a levee along the river front.

"The benefits to be derived from the construction of a levee are relatively small as compared with the cost, and the work cannot be recommended."

In February, 1894, the appellants or their predecessors in title for whom they have been substituted on the record, filed their petition in the Court of Claims against the United States, alleging themselves to be the owners of various tracts of land in Adams County, Mississippi, composing three plantations. It was alleged as follows:

"2. That before and prior to the year 1890 said plantation from its natural situation, was comparatively high and exempt from overflow from the waters of the Mississippi river, except at long intervals, and the occurrence of such overflows did not materially affect its productive capacity, or its value.

"That said plantation was highly improved, well stocked with laborers and tenants, yielded yearly large crops of cotton, corn and other products, and was worth the sum of fifty thousand dollars.

"3. That about the year 1883 the officers and agents of the United States, in pursuance of the act of Congress creating the Mississippi River Commission, and of the subsequent acts for the improvement of the navigation of the Mississippi River, adopting the so-called Eads' plan, projected, and have constructed, and are constructing, a system of public works for the purpose of so confining the waters of the river between lines of embankment, or levees, as to give increased elevation and velocity

and force to the current in order to scour and deepen the channel, and have thus caused an increased and abnormal elevation of at least four feet to the waters of the river at the high water or flood stage; and for said purposes have adopted and made use of systems of public and private levees, originally constructed for the reclamation of overflowed lands, on the west bank from the highlands of Arkansas to the mouth of the Red river, and from the mouth of the Red river to the Passes, and on the east bank from the highlands of Tennessee to the mouth of the Yazoo river, and from Baton Rouge to the Passes; but from the mouth of the Yazoo river to Baton Rouge, instead of adopting and constructing levees, have made use of the highlands skirting the river for said purpose, and have thus placed the plantations of petitioners, and others similarly situated between the lines of embankment, and exposed to the full force of the currents of the river, with such increased and abnormal flood level.

"And are so raising, enlarging, strengthening, adding to and constructing such levees, as to cause the plantations of petitioners, and others so situated to be flooded annually by the waters of the river, and to destroy the crops, growing and grown thereon, and to drown the live stock, and to undermine and wash away the buildings, fences and other improvements, and to fill up the drains and ditches, and to wash off the soil, and to cover the lands with sand and gravel, and to render them unfit for cultivation, and to entirely destroy their value.

"4. That in pursuance of the said plan for the improvement of the navigation of the river, the said officers and agents of the United States have undertaken to close the Atchafalaya river, a natural outlet carrying off near one-third of the surplus waters of the Mississippi, and to force the waters of the Red river and its tributaries, from their natural course through the Atchafalaya river to the Gulf of Mexico, into the channel of the Mississippi river,

and have so obstructed, and are so obstructing, the passage of the surplus waters through the Atchafalaya as to cause the waters of the rivers at the flood stage to annually back up and overflow the lands of petitioners, and to destroy the crops, growing and grown thereon, and to deposit thereon superinduced additions of water, earth, sand and gravel, so as to render them unfit for cultivation, and to entirely destroy their value.

"5. That by reason of the premises aforesaid the lands of petitioners, which before, from their natural situation, were comparatively high and secure from overflow, have been flooded annually by the waters of the rivers thus confined, in the years 1890, 1891, 1892 and 1893, and the crops growing and grown thereon, have been each year destroyed by said overflows, so caused, and the live stock drowned, and buildings and fences and other improvements undermined and washed away, and the ditches and drains filled up and the soil washed off, and covered with sand, and earth and gravel, so as to render them unfit for cultivation, and to entirely destroy their value, to the injury and damage of petitioners, as follows, to-wit: . . ."

Following an enumeration of loss of crops and personal property in the years 1890, 1891, 1892 and 1893 and the fixing of the value of the land at $50,000, recovery was prayed of $107,257.50, asserted to be due because under the facts alleged there had been a taking of the property by the United States for public use.

A demurrer to this petition was overruled on June 1, 1896. The nature of the ruling is indicated by the following excerpt from the opinion, reported in 31 Ct. Cls. 318:

"The petition undoubtedly sets up losses which are in the nature of consequential damages, of which the court has not jurisdiction. The Government may have increased the effect of the flood wrongfully or rightfully by the erection of its levees; but it did not in the constitutional

sense of the term take the claimant's cotton, mules, corn, cattle, and sheep for public use. Such a claim is not founded on an implied contract, and of it the court has not jurisdiction. But the petition does allege that 'the value of the land and the improvements destroyed was $50,000;' and that taking is presented by allegations so closely resembling those in the *Pumpelly* v. *Green Bay Company Case* that this court does not feel at liberty to say that they present no valid cause of action."

It is stated in the record that during the year 1908, first, second and third supplemental petitions were filed, although they are not reproduced, but the court below in its opinion declares the aggregate damages claimed was $569,702.50. To these petitions a demurrer seems to have been filed by the United States, which was passed upon in 1910, the order on the subject reading as follows:

"Within the former ruling in this case (31 Ct. Cls., 318), the demurrer to the original and supplemental petitions, in so far as they or either of them aver a taking of real estate—within six years from the date of filing of said petitions—by overflow proximately caused by the construction of levées or other public works in the improvement of the navigation of the Mississippi River pursuant to acts of Congress and within the ruling of the cases of *Pumpelly* v. *Green Bay Company* (13 Wall., 166) and *United States* v. *Lynah* (188 U. S., 445), is overruled.

But as to the alleged annual destruction of crops and personal property on said land so taken by overflow the demurrer is sustained."

Besides the supplemental petitions just referred to and the action of the court thereon in the period of sixteen years which elapsed between the entry of the order overruling the first demurrer in 1896 and January 5, 1912, when what is styled a fourth supplemental petition was filed, many proceedings were had, such as a hearing, the making of findings of fact and conclusions of law,

filing of motions to set aside the same, to amend the findings, etc, etc., none of which we need particularly refer to because in the first place, although mentioned, they are not reproduced in the record and in the second place, because we take it that the filing of the fourth supplemental petition was by permission of the court and with the consent of the United States, permitted for the purpose of restating the case of the claimants in its best possible aspect so that in the light of what had transpired a final disposition of the controversy might be had. We so conclude because there is not the slightest indication in the record of any objection having been made to the filing of the fourth amended petition and because obviously it had the significance which we attribute to it since the findings of fact which the court made the basis of the decree which is here under review in most important particulars, but copies and reproduces the allegations in the fourth supplemental petition. It becomes important therefore to exactly understand the issues presented by this petition before coming to consider and dispose of the case. And to this end, omitting all reference to averments relating to the mere description of the property involved or its value, we shall endeavor, not following the order of statement in the pleading, to accurately summarize its contents.

First. As to the situation of the lands, it was averred that said "lands are situated at Jackson Point, in the Alluvial Valley of the Mississippi, on the left bank of the river, 40 miles below Natchez and 25 miles above the mouth of Red River. That the basin in which the Jackson lands are situated commences at Ellis Cliffs, about 20 miles below Natchez, and extends to Fort Adams, about fifty miles below, with an average width of 2 miles and a maximum width of 6 miles, and is one of six (6) small basins of the Homochitto Basin," a description which beyond doubt, fixes the location of the lands as within

the minor basin lying between Ellis Cliffs and Fort Adams, the area and description of which as given in the recent report of the Mississippi River Commission we have before reproduced.

Second. As to the condition of the property prior to the doing of the acts complained of, it suffices to say that it was alleged that by means of levee protection resulting from work done by the owners of the property along the river bank, the property had been protected, that crops of large value had been raised thereon, and that improvements had been put thereon and that as a result of this protection by the levees built by the owners, although the property was occasionally overflowed by breaks in the levee, the overflow when it came was not destructive or of such long duration as to prevent the making of a crop, and that the property was highly improved, stocked with implements, etc., as alleged in the original petition, and was of great productive capacity and of large value to the owners.

Third. The facts from which it was alleged the property had been so injured or destroyed by work done by officers of the United States as to constitute a taking of the property by the United States for which adequate compensation was due, are stated under the following headings:

*a.* That about the year 1883 the officers and agents of the United States, "in pursuance of the Act of Congress creating the Mississippi River Commission, and of the subsequent acts for the improvement of the navigation of the Mississippi River, adopted the so-called Eads plan, by Act of Congress approved March 3, 1881, in consequence whereof have projected, and have constructed, and are constructing a continuous system of public works, for the purpose of so confining the flood waters of the river between lines of embankment, or levees, as to give increased elevation and velocity and force, to the currents, in order to scour and deepen the channel,

and have thus caused an increased and abnormal elevation of at least nine feet to the waters of the river at the high water or flood stage; and for said purpose have adopted and made use of systems of public and private levees, originally constructed for the reclamation of overflowed lands, on the west bank from the highlands of Arkansas to the mouth of the Red River, and from the mouth of the Red River to the Passes. . . ."

*b.* That for time beyond the memory of man the flood waters of the Mississippi River, passing Helena, Arkansas, where the highlands abut on the river, had escaped into the White River and Upper Tensas Basins, and passed in part through various designated bayous, rivers or streams which as we have previously said in describing the White River and Tensas basins on the west bank carried to the Gulf independently of the Mississippi waters which enter into or overflow these great watersheds. It being moreover, however, alleged that if they—that is, the waters passing Helena and which did not escape into the White River and Tensas Basins—"ever reached the lands of claimants in sufficient volume to flow them were speedily reduced by crevasses on the west bank, which allowed them to escape into the Atchafalaya Basin, and thus relieved the lands of claimants."

That in executing their plans as above described the officers of the United States had by the levees which they had constructed or maintained along the front of the White River and Tensas Basins, prevented the flow of a large volume of water into those basins which would have found its way to the Gulf without returning to the Mississippi as above stated, and had thus increased largely the volume of water flowing past the claimants' land and which therefore in time of flood would rest against the levee which protected their lands from overflow.

*c.* That for the purpose of carrying out their plans, the officers had built a levee to close a very extensive

break or crevasse in the levees on the west bank opposite to, or nearly so to the lands of the claimants on the east bank, known as the Bougere Crevasse, which carried off a great volume of water and relieved the pressure on the claimants' levee and thus additionally by retaining such water in the river augmenting the risk of overflow by increasing the danger of a break in the levees of claimants.

*d.* Because yet further to give effect to their plans, the officers of the United States had prevented large quantities of water which otherwise would have reached the Gulf through the Atchafalaya river, from taking that course, by works designed to retain water in the Mississippi, thus causing the water to back up against claimants' levee, and greatly increasing the danger of overflow.

*e.* That the plantations of petitioners are located within the limits of a narrow strip of land lying between the low water bank of the Mississippi River and the highlands east of it between Vicksburg and Baton Rouge, where the highlands skirt very closely to the river bank and are not protected by levee construction other than that built by the claimants, which has been destroyed and washed away by the recent flood waters of said river after the levee system had practically reached a state of completion and the United States had closed the Bougere Crevasse, as hereinafter alleged.

"That the United States has not attempted to connect the levee line on the east side of said river by the construction of levees on said irregular and narrow strip of land lying between Vicksburg and Baton Rouge for the reason that the cost of said levee construction, as shown by the Mississippi River Commission's Report for 1896, and the report and survey of the small basins in the Homochitto levee district between Ellis Cliff and Fort Adams, made in 1895 by Col. Geo. B. McC. Derby, the engineer officer in charge of said district, would exceed the value of the land lying between the river and the foothills, (of which

petitioners' lands are a part), to the amount of $206,500.00, it being more economical to use the foothills as levees, as now being done, and pay for the land destroyed, than to build levees on the east bank of said river between said city of Vicksburg and the city of Baton Rouge. That the Mississippi River Commission, in its report for the year 1910, in part says that the lands of petitioners are now subject to perpetual inundation."

The court below made elaborate findings of fact, contained in twenty-five numbered paragraphs. The first four relate to the title of the claimants to the land and we need not review them. Findings 5, 6, 7, 8, and 9 relate to the condition of the river prior to the work done by the Government, to the escaping of water into the White River and Tensas Basins as alleged, and to the increased pressure brought upon the levees protecting the lands of the claimants, to the greater frequency of overflow of such lands, etc., etc., some of these findings as we have said, being in the very words of the allegations of the supplemental and amended petition of 1912. Concerning the work done by the officers of the United States, findings numbered 10, 11 and 15 contain the following:

"X.

"Prior to the year 1883 the States and local authorities had constructed unconnected lines of levees for the protection and reclamation of lands subject to overflow from the mouth of Red River to the mouth of Arkansas and from the mouth of the Yazoo to the highlands below Memphis. The flood waters of 1882 destroyed miles of these levees.

"Beginning about the year 1883 and continuing to the present time, the officers and agents of the United States, pursuant to an act of Congress creating the Mississippi River Commission and the other acts amendatory thereof, and for the improvement of the Mississippi River for navigation, adopted a plan, the so-called Eads plan,

and in consequence thereof have projected and constructed and maintain—and are now engaged in constructing and maintaining certain lines of levees on both sides of the river at various places for various distances from Cairo, Ill., to near the Head of the Passes, a distance of 1,050 miles by river from Cairo, and the local authorities or organizations of the States bordering along the river on both sides from Cairo to the Gulf have before and since 1883 constructed and are now constructing and maintaining certain lines of levees at various places and of various lengths for the purpose of protecting and reclaiming lands within their respective districts from overflow in times of high water.

"The levee lines so constructed by the United States and local authorities have been joined, thus giving a continuous line of levees, as contemplated by the Eads plan, with the result that the flood waters of the Mississippi River to a great extent are confined within and between said levee lines and encompassed within a narrower scope than heretofore, acquired an increased velocity and higher elevation and the current thereof has become stronger and more forceful.

"The plan of the officers and agents of the United States so acting was to increase said velocity and scouring power of the water and to scour and deepen the channel of the Mississippi River and thereby improve it for navigation, and the purpose of the officers and agents of the State and local authorities constructing lines of levees at various points along and on both sides of the river was to reclaim and to protect land from overflow in times of high water. By so doing, the waters being thus confined within a narrower compass, as above indicated, have attained a higher elevation of approximately 6 feet in times of high water.

"XI.

"From Cairo, Ill., to near the mouth of the Yazoo River, just north of Vicksburg, the Mississippi River is practically

leveed on both sides, except on the east side, where the highlands abut on or near the river in Kentucky and Tennessee (from Port Jefferson, Ky., to a short distance south of Memphis, Tenn.) and thence on the west side to near the Head of the Passes, or to a point 1,050 miles by the river from Cairo, and on the east side from Baton Rouge to the same point near the Head of the Passes, leaving a gap in the line of levees of 234 miles in length, from the mouth of the Yazoo River to Baton Rouge, unleveed, where the foothills in some places hug closely to the east bank of the river, and at other points are from 2 to 6 miles from the river, in which strip of territory the lands of claimants are located between the highlands and the river, as before stated.

"The extension of the general levee system by the United States and the local authorities, since the United States adopted to its use and assumed 'permanent control' of the levees theretofore constructed by State and local authorities, has resulted in an increased elevation of the general flood levels, which subjects the claimants' lands to deeper overflow than they were subject to formerly, or would be subject to now, if the levee system were not in existence, and consequently has destroyed its value for agricultural and grazing purposes, causing its abandonment for that purpose since the year 1908. The immediate cause of the deeper overflow of claimants' land is the increased elevation of flood heights which is the result of the general confinement of the flood discharge by the levee system as a whole.

"XV.

"Before the creation of the Mississippi River Commission by act of Congress, and the adoption of the Eads plan as aforesaid, the levee lines along the Mississippi River theretofore constructed by State and local authorities consisted of a broken chain of levees of insufficient height and strength to confine the flood waters, and had

been built without regard to a uniform grade line. The United States then caused a survey and report to be made by its officers and agents showing the condition and location of levee lines theretofore constructed by State and local authorities as they then existed. This survey suggested a proposed continuous system of levees from Cairo to the Head of the Passes. In many instances it was a blanket survey which encompassed and took in the lines of levees theretofore constructed by State and local authorities as above stated. The project recommended by the Mississippi River Commission adopting the Eads plan for the systematic improvement of the river from Cairo to the Head of the Passes was practically adopted by act of Congress approved March 3, 1881. The United States then undertook the projection and completion of a continuous line of levees from Cairo to the Head of the Passes, as suggested by this survey and the Eads plan, and as recommended by the Mississippi River Commission, and, in furtherance of that plan and as part of and supplementary thereto, adopted to its use, and is now using, the levees theretofore constructed by State and local authorities, thereafter making them much larger and stronger. Since that time, levee construction, whether done by the United States or State and local authorities, has been in conformity with the grades and methods of construction adopted by the Mississippi River Commission, and the efficiency of the levee system has been largely due to this fact.

"The extension of this levee system by the United States from Cape Girardeau, Mo., to the Head of the Passes was authorized by act of Congress in 1906." (34 Stats. 208.)

The remainder of the findings are but cumulative and we do not pause to state them.

The court concluded in view of the authority of the United States over navigation and its right to construct works for that purpose, that there was no liability on the

part of the Untied States, basing its views on this subject upon *Bedford* v. *United States*, 192 U. S. 217, 225. The petition was therefore dismissed.

Before we take up the contentions advanced by the appellants to establish that the court below was wrong in deciding that there was no liability on the part of the United States, we consider it necessary, lest misconception otherwise might result, to refer to what we deem to be grave errors committed by the court in certain particulars, even although in passing upon the merits we shall consider the case in such an aspect as to cause it to be unnecessary to review the errors in question for the purpose of passing on the merits. In the first place it is apparent that in many important respects matters which the court below has stated as findings of fact are mere conclusions of law. This is true for instance of the broad conclusion embodied in the findings of fact as to the relation of the United States to levee work and the power of the Mississippi River Commission over all such work by whomsoever performed. In the second place, treating it as a question of law, we think the error is apparent from a consideration of the statutes and the official reports relating to the subject, which we may judicially notice. It is true indeed that when the Eads theory, illustrated by the successful jettying of the mouth of the river under a contract made with Captain Eads, came to be understood and it also came to be appreciated that the most efficient way to improve the navigation of the river was to ultilize the vast power of the river, by confining its waters within its banks, thus directing its energies to cutting out a deeper channel, Congress legislated to the accomplishment of such result by the creation of the Mississippi River Commission, and by conferring the power upon that body to improve the navigation of the river and to build levees for that purpose with the appropriations which were made from time to time to carry out these great purposes. But nothing in

that legislation justifies the conclusion that, irrespective of navigation, Congress assumed control of the entire work of protection from overflow by levees, to the displacement of the state or local authorities. On the contrary, the reports of the Commission and the public documents and history connected with the same leave no room to doubt that as necessarily the levees built by the United States in aid of navigation at the same time afforded protection from overflow and thus served a twofold purpose, that thereby renewed energy was stimulated in state and local authorities to undertake the work of building levees for protection, so that one continuous and complete system of protection would be evolved. It is of course true, also, that the intelligent work of the Mississippi River Commission furnished a standard which served in a sense to control and direct the coöperating energies of others. The gravity of the error, as expressed in the findings of the court below, is illustrated by the fact that it treated the injury alleged to have been suffered as arising alone from the acts of the United States, when in truth, if there was such injury, it could only have resulted from the concurrent action of the United States, the States and their subordinate agencies, including individuals, all acting to the realization of a common end, that is, an efficient and continuous line of levees, although action was impelled by different considerations. This is illustrated by the statement made by the Mississippi River Commission in its annual report for 1894, pp. 2713–2715, where, in referring either to the claim of damage made in this case or to one like it, it was said:

"The injury will not be traceable to levees built by the United States any more than to those built by the States and local organizations. Neither can it be attributed to the levees on any particular or limited portions of the river. It will be a result of the system as a whole."

But passing, for the sake of argument, these considera-

tions, let us look at the case in the light of the findings as made.

It is apparent, taking the broadest possible view in favor of the claimants, that the grievance which they allege they have suffered, can only rest upon three grounds:

1st. The building by the officers of the United States of lines of levees along the bank of the river for the purpose of retaining the water in the river, treating, for the sake of the argument, all acts done by the local authorities in building levees or closing breaks as acts of the United States.

2nd. The failure of the United States to build on the east bank of the river along the minor basins which we have fully described, a line of levees so as to afford means of protection from the increased danger of overflow arising from the fact that the lines of levees along the river on the west bank and elsewhere had been raised and strengthened and extended, thus at least beyond doubt temporarily increasing the level of the flood in times of high water.

3rd. The performance of work by the United States tending to diminish the outflow of water from the river through streams which flowed from it, to the end that a more efficient body of water might remain in the stream for the purpose of accomplishing the deepening of the channel and thus more effectively improving the navigable capacity of the river.

Let us primarily test the merits of the first ground of complaint, that is, the building of levees. It is not averred that the land of the claimants bordering on the east bank of the river in the absence of all levees and in a state of nature would not in seasons of high water, be overflowed; and if it had been so alleged it is certain there would be no right on the part of an individual to insist that primitive conditions be suffered to remain and thus all progress and development be rendered impossible. When accurately

fixed, the complaint is but this, that because the claimants had built a levee for the purpose of protecting their lands and which answered that purpose if levees were not built by others to protect their lands, actionable injury would be occasioned claimants when anybody else sought to protect his land from overflow, since to so do would increase the volume of water in the river and raise the flood level to the detriment of claimants. In its essence, however, this but amounts to saying that because the claimants have built a levee along their property for the purpose of protecting it from overflow in times of high water, they have acquired the right to stereotype the conditions existing at the time they built their levee even to the extent of preventing any one from subsequently exerting his right to build a levee to protect his land. Nothing could more completely illustrate the accuracy of this statement than the averments in the supplemental petition concerning the closing of the Bougere Crevasse, since those averments in their last analysis but charge that there was a right on the part of the claimants to subject a vast area of country on the west bank to the devastation resulting from the existence of so extensive a crevasse, simply because to close it would subject the levee of claimants across the river, to a greater pressure consequent on the retaining of the flood water of the river within its banks. And indeed a like illustration is afforded by the averments as to the escape of water from the river on the west bank, and the spread of that water through the White River and Tensas Basins until it ultimately reached the Gulf, by emptying into remote streams. To make the demonstration, if possible, clearer, let us suppose that by the acts of individuals for their own protection sanctioned by the local laws, a complete line of levees had been built accomplishing the very result which it is insisted brought about the injury here complained of. Would it be said that the claimants would have a resulting right of action in damages because

other owners had exerted the very right which the claimants had previously resorted to for the purpose of protecting their own land? If not, upon what imaginary ground can it be said that because a work which was lawful in and of itself, was done by the United States, therefore responsibility in favor of the claimants was entailed.

Coming to the second contention, we think it is disposed of by the following considerations:

In the first place—by the report of the Commission to which we have referred the impossibility was pointed out of building a levee along the line of the minor basin in which the land of claimants is situated, without destroying said land, because of its peculiar situation, unless there was a permanent system of pumping to take out the water which would gather in the watershed. In the second place—looked at from the point of individual right and corresponding responsibility, it is impossible to conceive by what principle it can be said that because an individual having a right to do so has built a levee to protect his land from overflow, and because his levee has accomplished that result by retaining the water in the river, that thereby there arose a duty on his part to build a levee to protect the land of another or in the alternative to pay for such land.

Indeed, the propositions but assert on the one hand that the United States is liable because it did that which it had a right to do and on the other that it is liable because it abstained from doing that which it was under no duty to do. Both the fundamental errors which the contentions involve are exemplified in the arguments used to sustain them since, it is urged that because the levees constructed on the bank of the river operated to keep the water in the river from flowing out, that thereby they served to bring water into the river from without, and that the mere abstention from building levees at a particular place or on a particular line operated to transfer the bank of the river

over to the foot of the hills or to move the hills over to the river so as to cause them to become its banks.

The third consideration, that is, the preventing of the outflow of water by work done in the tributaries and the consequent increase in the volume of water in the river, cannot be tested from the point of view of individual authority, as the power to so do involves necessarily the exercise of governmental power. We therefore come to consider the proposition in that aspect. In doing so, however, it is to be observed that even if all the previous considerations which we have stated concerning the nonliability to result from building levees, measured by the right of an individual to build a levee to prevent the water of a river from overflowing its banks and destroying his property, be put out of view, and the case therefore in all its aspects be tested by the scope of the governmental authority possessed by the United States, the absence of merit in all the claims is too clear to require anything but statement. We say this because the plenary power of the United States to legislate for the benefit of navigation and to construct such works as are appropriate to that end, without liability, for remote or consequential damages, has been so often decided as to cause the subject not to be open. It was directly ruled as to work done by the Mississippi River Commission in *Bedford* v. *United States*, 192 U. S. 217, 225, upon the authority of which case, as we have said, the court below placed its ruling, and as the underlying principles which controlled the decision in the *Bedford Case* and which govern the subject were again at this term with much elaboration stated and applied, we think it unnecessary to do more than refer to that ruling (*United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53), and to direct that the judgment below be

*Affirmed.*

# HUGHES *v.* UNITED STATES.

# UNITED STATES *v.* HUGHES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 718, 719. Submitted January 10, 1913.—Decided June 16, 1913.

*Jackson* v. *United States*, *ante*, p. 599, followed to effect that the United States is not liable for damages caused by overflow of lands in the Mississippi valley caused by the levees constructed by state and Federal authority for protection from overflow and improvement of navigation, and that such overflow does not amount to a taking of property within the Fifth Amendment.

The wrongful act of an officer of the United States, such as dynamiting a levee in an emergency so as to prevent the water from interfering with other work under construction, is not the act of the United States; nor does it amount to taking for public use the property overflowed as a result of the dynamiting.

45 Ct. Cl. 517, affirmed.

THE facts, which involve the question of liability of the United States for damages alleged to have been sustained by the owner of a plantation in the Mississippi River Valley by reason of the improvements of the Mississippi River under direction of the Federal Commission charged with that work, are stated in the opinion.

*Mr. Waitman H. Conaway* for appellant in No. 718 and appellee in No. 719.

*Mr. Assistant Attorney General John Q. Thompson* and *Mr. J. Harwood Graves* for the United States.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This suit was commenced to recover from the United States the sum of $200,560, subsequently reduced by an

amended petition to $165,000, and $12,000 per annum until the principal sum was paid on the ground that the United States had as the result of work done by it in relation to the Mississippi River, taken, in the constitutional sense, two certain plantations belonging to the claimant, one the Wigwam plantation situated on the east bank of the Mississippi, and the other a plantation known as the Timberlake plantation also lying on the east bank but higher up the river, that is, in Bolivar County, Mississippi, and opposite Arkansas City on the west bank. As to the first, the Wigwam plantation, there was judgment below in favor of the United States, rejecting the claim, and No. 718 is an appeal by the claimant from that judgment. As to the Timberlake plantation, there was a judgment against the United States for what was deemed to be the value of the plantation, and No. 719 is an appeal by the United States from that judgment. The court made a series of general findings stating what was considered to be the facts concerning the situation upon which the right to recover in a general sense as to both plantations was based. It then made particular findings as to the Wigwam plantation and like findings as to the Timberlake plantation. Although the general findings are in some respects amenable to the criticism that they draw erroneous conclusions of law concerning the legislation of Congress, with regard to the improvement of the Mississippi River, and the action of the officers under such legislation, as was done in the *Jackson Case*, and also treat such mistaken conclusions as findings of fact, such errors are not as apparent as they were in the *Jackson Case*. This results from the fact that the general expressions in the findings manifesting the error which we pointed out in the *Jackson Case* are as a rule in this case qualified by statements incompatible with the general expressions and which therefore serve to correct the error which otherwise would exist. Thus, in finding 1, after referring to the St.

Francis and other basins on the west bank and the outflow of water into these basins ultimately reaching the Gulf of Mexico, as described in the findings in the *Jackson Case*, and the stoppage of such outflow and consequent increase of the volume of water in the river which in the *Jackson Case* was virtually attributed exclusively to work done by the United States or under its control, the finding in this case accurately states the relation of the United States and the local authorities to the work as follows:

"The outlets and drains thus provided by nature were such as to accommodate said flood waters, and the lands of claimant were not overflowed as frequently before the outlets were closed by levee construction by the United States to improve the river navigation, and by the State and local authorities to protect and reclaim land subject to overflow in times of high water, and consequently were but little injured by said overflows."

So, again, in No. 2, although the finding refers to the adoption of the Eads plan almost in the same all-embracing words used in the *Jackson Case*, it yet states in explicit terms that the acts of Congress but authorized an improvement of navigation and empowered expenditures for that purpose and in referring to levee construction done pursuant to such Congressional action, it is declared in the finding: that the United States "for the improvement of the Mississippi River for navigation . . . and the local authorities or organizations of the States bordering along the river on both sides from Cairo to the Gulf have before and since 1883 constructed and are now constructing and maintaining certain lines of levees at various places and of various lengths for the purpose of protecting and reclaiming lands within their respective districts from overflow in times of high water." Again, in the concluding part of the fourth finding a statement in accord with that made in the *Jackson Case* is found concerning the coöperation of the United States and local authorities in

levee building which is qualified, however, by subsequent statements which with reasonable accuracy displays the real situation, that is, the unifying of the energies of the United States and the local authorities to a common end, levee construction, although the purpose on the one hand was the improvement of navigation and on the other the protection of land from overflow. And this also is further illustrated by finding 3 which points out the scope and character of the authority delegated by Congress to build levees, that is, the improvement of the navigation of the river.

The special findings relating to the Wigwam plantation but established that that plantation was situated in one of the minor basins below Vicksburg like those between Natchez and Baton Rouge which were described in the *Jackson Case.* Indeed, the court, in express terms found there was identity between that case and this, and placed its conclusion against the right to recover upon its ruling in the *Jackson Case;* and in so doing, in view of our affirmance of the judgment in the *Jackson Case,* it follows that in our opinion no error was committed.

As to the Timberlake plantation, special findings were made, and omitting those which relate to the title of the claimant and to the loss suffered by the overflow of the property in the years following the special action by the Government, which it was considered gave rise to the right to relief, the findings are as follows:

"IX.

"TIMBERLAKE PLANTATION.

"Prior to the construction of the Huntington Short Line levee by the United States the waters of the Mississippi River did not overflow and submerge the Timberlake plantation hereinafter described at such frequent intervals and for such duration as to disturb the claimant in the profitable use, enjoyment, and possession thereof or so as to materially affect its cultivation, productive

capacity, or market value. It was then suitable for the purpose of raising thereon, and there was profitably raised thereon, crops of cotton, cotton seed, corn, hay, and other products. Since the completion of said Huntington Short Line levee by the United States, placing the plantation of claimant between the old and new levee, in the restricted and narrower high-water channel of the river, the rises in the water of said river, by reason of the water being thus confined and restricted in its flow, have been, and are now, occurring at such frequent intervals and for such duration as to prevent the claimant from raising any kind of a crop thereon; the buildings have become untenantable and uninhabitable; the fencing washed away; the land covered with superinduced additions of water, earth, sand, and gravel to a depth of from 3 to 12 feet; said land has since grown up in willows, cottonwood, underbrush, and weeds so as to render it valueless to her; to destroy its market value; and to compel its abandonment.

"X.

"Prior to 1898 said lands (Timberlake plantation) were comparatively high and secure from overflow by the flood waters of the Mississippi River, except at long intervals, and the occurrence of such overflows did not materially affect their productive capacity or market value. Said lands were highly improved, well stocked with tenants and laborers, yielded large crops of cotton, cotton seed, corn, hay, and other products, were located adjacent to what was formerly the town of Huntington, located between the Huntington Short Line levee and the river, since washed away by the flood waters of the Mississippi River, and deserted as a place of residence by the inhabitants some years after the building of the Huntington Short Line levee—1898–1900—was very valuable as plantation property, and was worth the sum of ninety thousand dollars ($90,000).

"The claimant, Mary E. Hughes, obtained $12,000 from

the Board of Mississippi Levee Commissioners, by judgment, for damages to the drainage of the Timberlake plantation into Black Bayou when it was thrown out by the construction of the Huntington Short Line levee in 1898–1900. This plantation is located in the vicinity of and opposite the Arkansas City gauge and was protected from overflow up until the time of the construction of the Huntington Short Line levee.

"XI.

"Prior to the year 1898 said Timberlake plantation was protected from overflow by the flood waters of the Mississippi River by a continuous levee line located in front of said lands along, by, and close to the river bank for its entire frontage, built by State and local authorities, and said plantations still remained valuable for plantation purposes, and up to that time had not been seriously injured in its use and enjoyment by the flood waters of said river.

"About the year 1898 the United States surveyed and thereafter began to construct what was known as and now called the Huntington Short Line levee, a new levee, about 15 feet high, located some distance back from the old levee, behind the land of claimant, thus placing and permanently locating said Timberlake plantation between the Huntington Short Line levee and the old levee in the narrower high-water channel and bed of the river, placing an additional burden and servitude thereon and subjecting said property to more frequent and destructive overflows and the force and scouring power of the high-water current of said river. After the completion of the Huntington Short Line levee a high water came in the river during the year 1903 and because of a break in said old levee the water of said river began to flow onto and over the plantation of claimant, then located between the old levee and the Huntington Short Line levee, and remained standing on and over said land to a great depth after the

high waters receded, and because of the great pressure of the water thus confined, standing against said Huntington Short Line levee, threatening its destruction by breaking through, the United States then caused the old levee to be blown up by dynamite in many places, so as to relieve the pressure of the water standing against the Huntington Short Line levee, and to save it, thus causing the water to rush over and across said land, injuring it for agricultural as well as all other purposes, greatly reducing its value.

"XIV.

"Upon the foregoing facts the court finds as an ultimate fact, so far as it is a question of fact, that the effect of placing and permanently locating the Timberlake plantation of claimant between the Huntington Short Line levee and the old levee, and the river bank, was and is an act on the part of the United States intending to place, and which finally resulted in placing, the lands of claimant in the narrower high-water channel of the Mississippi River, subjecting it to more frequent and destructive overflows, and the forceful and destructive action of the current, placing an additional burden and servitude thereon, which had finally resulted, since the years 1907, 1908 and 1909, in such serious and continuous interruption to the common and necessary use and enjoyment of said property, as to amount to a taking thereof by the United States under the fifth amendment to the Constitution."

It will be observed that finding 9, although special to the Timberlake plantation contains statements concerning the general raising of the flood level in the river as the result of levee work done by the United States and the state and local authorities followed by a description of the injury by overflow to the Timberlake plantation which would give rise to the inference that the judgment which was rendered against the United States as to that plantation was based upon a consideration of that subject. If

that view were taken the case would be controlled by our decision just rendered in the *Jackson Case*, but we cannot adopt that view of the court's action, as the court in the *Jackson Case* decided that like facts did not justify recovery against the United States and reiterated in this case its conclusion in that respect by rejecting the claim as to the Wigwam plantation. Under this view we assume that finding 9 was a mere inadvertence, or at all events if not so may be now put out of view. This leaves only for consideration the special facts concerning the Timberlake plantation.

The plantation bordered on the river and was protected by a levee. Whether that levee was built by the private efforts of the owner of the land or by state or local authority does not appear. The officers of the United States deeming it advisable in aid of the improvement of navigation to construct a new levee, did not locate it along the river in front of the plantation, but joining the existing line of levee somewhere above the projecting point on which Timberlake plantation was situated, built a direct line of levees which passed across the point several miles back of the Timberlake plantation and joined the line of levees on the river bank below the plantation. This levee, known as the Huntington Short Line, is thus described in the report of the Mississippi River Commission for 1898, at p. 3390:

"*Huntington Short Line.*—This is a new levee under construction from Mound Landing to a point about 1½ miles below Offutts Landing. The new levee here is 4.4 miles in length, and will shorten the levee line 7 miles over its present length."

The findings exclude the conception that this new and more direct levee was built upon land belonging to the owner of the Timberlake plantation. They show that the location and construction of this new line of levee was approved by the local levee authorities, since they estab-

lish that those authorities paid to the owner of the Timberlake plantation a sum of money for the incidental damage occasioned to that plantation by the fact that the levee in passing in the rear of the plantation obstructed drains or means of drainage by which the surface water of the plantation was carried off to the rear. The report of the Mississippi River Commission for 1900, p. 4849, shows that before this payment was made by the local authorities there was a suit brought by owners of the plantation and that that suit culminated in a recognition by the local courts of the right to build the levee on payment of the sum stated, which was but a part of a much larger claim made which was disallowed. The facts just stated serve to demonstrate the error which was committed in deciding that the exertion of national power to build levees for improving navigation had effaced the exercise of state power to construct levees for protection from overflow, since they manifest the harmonious coöperation of the two powers, the United States bearing the burden of building a great levee in the interest of navigation and the local authorities, in view of the protection from overflow which necessarily resulted from the construction of the levee for navigation purposes, contributing the amount essential to pay an award of a local character.

Upon all these facts we are unable to perceive any ground for distinguishing the claim as to the Timberlake from that as to the Wigwam plantation or from the claims which were held to be without merit in the *Jackson Case*. We say this because the claims in the *Jackson Case* as well as the claim in this case made as to the Wigwam plantation in their last analysis but involve the assertion of a right of recovery against the United States for failing to build a levee in front of the plantations in question for the purpose of affording them protection from the increased stage of high-water which it was asserted had been created by the act of the United States in building levees elsewhere along

the river. This being so, as it is not pretended that the building of the new line of levee here considered trespassed upon the property rights of the owners of the Timberlake plantation by an actual taking of land, the asserted claim but comes to this, that the owner of the Timberlake plantation abutting on the river is entitled to hold the United States responsible because in improving the navigation of the river the officers of the United States, in selecting the place where a levee should be built did not select the front of the plantation, that is, did not construct the levee along the river bank of the plantation. Thus accurately fixing the contention, it is patent that we cannot affirm the judgment of the court below against the United States as to the Timberlake plantation without reversing its judgment in favor of the United States as to the Wigwam plantation and without disregarding the decision which we have just announced in the *Jackson Case*. In saying this we are not unmindful of expressions in the findings, and which indeed the court below declared in express terms was the basis of its legal conclusion in respect to the liability of the United States, to the effect that the building of the new levee operated to change the situation of the claimant's property by putting it in the bed of the river. But the substance of things may not be changed by mere figures of speech. The plantation was situated on the bank of the river. It was protected from overflow by the levee on that bank. Whether that levee was private or public, as we have said, does not appear, but nothing in the fact that a new levee was built far in the rear of the plantation changed the physical situation, or had the magical effect of transporting the property from one place to another. Where it was before the location of the new levee, it remained after the new levee was completed. True it is that if from caving banks or other natural causes it became impossible to protect the property by means of a levee along its front, that fact was in

no way caused by the building of the new levee, and if high water and disastrous overflow subsequently came from the inherent weakness of the existing levee along the front on the river bank, the consequent loss may not be attributed to the fact that a new and stronger levee was constructed along shorter and safer lines. There is no pretence of any intention to injure the claimant by the building of the new levee; and on the contrary, light is reflexly thrown upon the conditions which led to the exercise of judgment on the part of the officers of the United States in building the new levee on the much shorter and more direct line by the report of the Commission for 1899, at p. 3555, where the caving condition of the bank of the river in and about the place where the plantation was situated, is stated.

As to the statement in one of the findings concerning the act of an officer of the United States after the old levee had given way in using dynamite to enlarge the opening, we find it difficult to understand the finding. Of course it can be easily appreciated that when a break occurred in the old levee along the bank, that impelled by the great force of the current of the river and the volume of its water, there rushed through the opening or crevasse with great momentum, a body of water which might before its force was spent strike the new levee, although it was far in the rear, and endanger its safety, a danger which is aptly portrayed as to a relatively similar situation elsewhere in the report of the chief of engineers for 1903 at p. 260. But the finding does not seem to refer to such a danger nor to assume that the dynamite was used to guard against it, that is, to expand the opening in the old levee to such a degree that although increasing the quantity of the flow of water it would diminish its momentum and thus prevent the danger of striking against the new levee and sweeping it away. We say this since taking the finding literally it gives rise to the conviction that the old levee